Supreme Court, U.S.
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No. 06-566

In The

Supreme Court of the United States

EDO GEORGE MBABA AND
PATIENCE MBABA,

Petitioners,

v.

SOCIETE AIR FRANCE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Issue 1: Whether the Warsaw Convention, a treaty of the United States, precludes any recovery for an international airline passenger's state law breach-of-contract claims when the airline charged $4,048.66 more than the $520.00 contracted for to transport four excess bags.

CORPORATE AFFILIATIONS

(1) Respondent Societe Air France is an "agency or instrumentality of a foreign state" within the meaning of 28 U.S.C. § 1603 because a majority of its shares are, and have been at all relevant times, owned by the Government of France.

(2) Societe Air France's subsidiaries and known affiliates are:

Air Charter
Group Jet Tours
Go Voyages
Groupe Servair
Air Inter
EuroBerlin
Ecole de Pilotage Amaury de la Grange
REVIMA
CRMA
Esterel
Sodetair
Societe Immobiliere Aeroportuaire
GIE Amadeus France
SODEXI
Groupe Air France Finance
FINACTA

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
TREATY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
A. Nature of the Case	3
B. Proceedings Below	4
REASONS FOR GRANTING THE PETITION	5
I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS AND TO CLARIFY THE MEANING AND APPLICATION OF A TREATY	9
A. The Circuits Are Split on the Issue of Broad Preemption by the Warsaw Convention	10
B. The Courts Below Misplaced Their Reliance on Montreal Protocol No. 4's Change in Article 24	13
C. The Courts Below Misread ***Tseng***	14
II. THE DECISION BELOW CANNOT BE RECONCILED WITH THE VIEW OF THE COURT OF LAST RESORT OF A SISTER SIGNATORY THAT THE TREATY WAS INTENDED TO UNIFY ONLY "CERTAIN" RULES – NOT *ALL* RULES	17
CONCLUSION	18
PRAYER	19

TABLE OF AUTHORITIES

Page

CASES:

Abramson v. Japan Airlines Co., Ltd., 739 F.2d 130 (3d Cir. 1984) 5, 11, 14

Air France v. Saks, 470 U.S. 392 (1985) 9, 14, 17

Chan v. Korean Air Lines, 490 U.S. 122 (1989) 7, 9, 14

Eastern Air Lines v. Floyd, 499 U.S. 530 (1991) 5, 9

El Al Israel Ltd. v. Tseng, 525 U.S. 155 (1999) ..... *passim*

Floyd v. Eastern Airlines, 872 F.2d 1462 (11th Cir. 1989), *rev'd on other grounds*, 499 U.S. 530 (1991) 9, 11, 14, 15, 16

Hernandez v. Air France, 545 F.2d 279 (1st Cir. 1976), *cert. denied*, 430 U.S. 950 (1977) 11, 14

Imtiaz v. Emery Air Freight, Inc., 728 S.W.2d 897 (Tex. App. – Houston [1st Dist.] 1987, no writ) 12

King v. American Airlines, Inc., 146 F.Supp. 2d 159 (N.D.N.Y. 2001) 12

King v. American Airlines, Inc., 284 F.3d 352 (2d Cir. 2002) 12

Motorola, Inc. v. Fed. Express Corp., 308 F.3d 995 (9th Cir. 2002), *cert. denied*, ***Kuehne & Nagel v. Motorola, Inc.***, 538 U.S. 1068 (2003) 6

Olympic Airways v. Husain, 540 U.S. 644 (2004) 9, 14

Potter v. Delta Airlines, Inc., 98 F.3d 881 (5th Cir. 1996) 5, 14

Read-Rite Corp. v. Burlington Air Express, Ltd., 186 F.3d 1190 (9th Cir. 1999) 11

TABLE OF AUTHORITIES – Continued

Page

Tseng v. El Al Israel Airlines, Ltd., 122 F.3d 99 (2d Cir. 1997), *rev'd*, ***Tseng***, 525 U.S. 155 (1999) 5, 17

Victoria Sales Corp. v. Emery Air Freight, Inc., 917 F.2d 705 (2d Cir. 1990) 11

Wallace v. Korean Airlines, 214 F.3d 293 (2d Cir. 2000) 14

Wolgel v. Mexicana Airlines, 821 F.2d 442 (7th Cir. 1987), *cert. denied,* 484 U.S. 987 (1987) 5, 10

Zicherman v. Korean Air Lines Co., 516 U.S. 217 (1996) 9, 14

STATUTES:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 4

28 U.S.C. §§ 1331 and 1441 3

28 U.S.C. § 1603 ..... 3, 4

49 U.S.C. § 40105 1

OTHER AUTHORITIES:

Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, October 12, 1929, 49 Stat. 3000 T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted in note following* 49 U.S.C. § 40105 (1997) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Second International Conference on Private Aeronautical Law, October 4-12, 1929, Warsaw, Minutes 176 (R. Horner & D. Legrez transls. 1975) 17, 18

Sidhu v. British Airways plc, [1997] 1 All E.R. 193 ..... 17, 18

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 457 F.3d 496 (5th Cir. 2006). App. 11b-25b.[1]

The memorandum and order of the United States District Court for the Southern District of Texas (Atlas, J.) granting Air France's motion for summary judgment is not reported. App. 1a-10a.

JURISDICTION

The Judgment of the U.S. Court of Appeals for the Fifth Circuit was entered July 25, 2006. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

TREATY PROVISIONS INVOLVED

The articles of the treaty known as the Warsaw Convention[2] involved are Articles 1, 17, and 24.

Article 1(1) of Chapter I, "Scope-Definitions," provides:

> • (1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. . . .

Article 17 of Chapter III, "Liability of the Carrier," provides:

> • The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

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[1] References to the Appendix are indicated as App. ___a.

[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, October 12, 1929, 49 Stat. 3000 T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted in note following* 49 U.S.C. § 40105 (1997).

Article 24 of Chapter III, "Liability of the Carrier," as modified by Montreal Protocol No. 4,[3] provides:

- (1) In the carriage of passengers and baggage, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.
- (2) In the carriage of cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the limits of liability set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. Such limits of liability constitute maximum limits and may not be exceeded whatever the circumstances which gave rise to the liability.[4]

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[3] Montreal Protocol No. 4 was ratified by the Senate on September 28, 1998, and went into effect on March 4, 1999. ***Tseng***, 525 U.S. 174.

[4] The prior version of Article 24 – before Montreal Protocol No. 4 – provided:

> (1) ***In the cases covered by Articles 18 and 19*** **any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.**
>
> (2) ***In the cases covered by Article 17*** **the provisions of the preceding paragraph also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.**

Tseng, 525 U.S. at 163. [Emphasis added to show language that was changed; other words were also added.]

STATEMENT OF THE CASE

Petitioners Edo George Mbaba and his wife Patience Mbaba sued Societe Air France in the District Court of the State of Texas, Harris County. App. 12b. They alleged breach of contract, fraud, and violations of a Texas consumer protection statute known as the Deceptive Trade Practices Act arising from Air France's charge of $4,048.66 to carry four excess bags from Texas to Nigeria. *Id.* Air France removed the case to federal court under 28 U.S.C. §§ 1331 and 1441 because Air France is a foreign state within the meaning of 28 U.S.C. § 1603. *Id.* Upon Air France's motion for summary judgment, the district court dismissed all of the Mbaba's claims as preempted by the Warsaw Convention. App. 11b. The court of appeals affirmed.

A. Nature of the Case

Petitioner George Mbaba paid $1,167.26 for a ticket to fly on Air France from Houston, Texas, to Lagos, Nigeria, on June 15, 2002. App. 2a; App. 11b-12b. The flight had an intermediate connection in Paris, France. *Id.* It is undisputed that George checked four pieces of "excess baggage" in Houston and paid Air France's "excess baggage" charge of $520.00 before embarking ($130.00 per excess bag). *Id.* It is undisputed that when Air France collected the $520.00 from George in Houston, it handed George an "excess baggage ticket" showing the $520.00 payment and indicating that the four bags would be transported from Houston to Lagos. *Id.*

Mbaba alleges – and Air France has not disputed – that the Air France gate agent in Paris demanded that he pay an additional $4,048.66 for transporting the bags from Paris to Lagos, threatening that if Mbaba did not pay, his bags would be "taken outside and burned." App. 2a. The parties do not dispute that Mbaba paid the additional $4,048.66.[5] *Id.*

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[5] George paid the $4,048.66 using Patience's American Express card. This is the sole reason that Patience is a party in the case at bar.

(Continued on following page)

B. Proceedings Below

Petitioners' pleading in Texas state court sought damages arising out of Air France's breach of a contract to transport the excess bags to Nigeria for $520.00 and Air France's fraud and deceptive trade practices in inducing George Mbaba to enter that contract. App. 12b. Mbaba alleged that Air France's fraud and deceptive trade practices were committed when he checked in for his international flight in Houston. He alleged that Air France breached the contract when he checked in for his connecting flight to Nigeria in Paris, France.

Mbaba's pleadings do not refer to the Warsaw Convention or assert any rights thereunder. App. 12b. Mbaba did not allege an accident, personal injury, mental anguish, delay in his travel, or loss or damage to his bags. *Id.* Mbaba sought only the benefit of his bargain – that Air France refund the $4,048.66 that Air France should not have charged him.

Air France removed the action to the district court on the basis that Air France is a foreign state within the meaning of 28 U.S.C. § 1603. App. 12b. Petitioners' motion to remand was denied.

On March 29, 2005, the Honorable Nancy Atlas of the United States District Court for the Southern District of Texas granted Air France's motion for summary judgment. App. 11b. Judge Atlas noted that Mbaba's claims did not fit within any of the Convention's substantive liability provisions, but ruled that "the Convention is the sole source of a remedy for an international traveler against an airline." App. 20b-21b.

Mbaba appealed to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1291, seeking to reverse the dismissal of his contract claims and remand to the district court for a trial. On appeal, the Fifth Circuit affirmed the district court's summary judgment against Mbaba, holding that the Convention precludes passengers from bringing actions of *any kind* under local law when they cannot establish air carrier liability under the Convention. App. 6a.

Patience was not aboard the June 15, 2002, Air France flight or present at the Air France ticket counter in Paris.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted to resolve a live, direct conflict between the Fifth and Seventh Circuit Courts of Appeals (which also touches decisions by the First, Second, Third, Ninth, and Eleventh Circuits) as to whether the Warsaw Convention, a treaty of the United States, exclusively governs and precludes state law causes of action for a passenger's damages even if the damages were of a nature – and sustained as a result of an event – that the Convention does not address.

In ***El Al Israel Ltd. v. Tseng***, 525 U.S. 155 (1999), this Court held that remedies for personal injury, which the Warsaw Convention specifically addresses in Article 17, must be found in the Convention or they are not available to the passenger at all. Overruling cases from the Second[6] and Third[7] Circuits and resolving the conflict between those cases and the Fifth Circuit,[8] this Court held in ***Tseng*** that local law is preempted for any species of personal injury which the Convention does not address (such as, for example, "purely mental injuries"[9]).

Before ***Tseng*** was decided, this Court denied certiorari to address the preemption of contract claims in a case that allowed those claims to proceed. *See* ***Wolgel v. Mexicana Airlines***, 821 F.2d 442, 444 (7th Cir. 1987), *cert. denied*, 484 U.S. 987 (1987). However, Montreal Protocol No. 4 changed the language of Article 24 in 1999.[10] The

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[6] ***Tseng v. El Al Israel, Ltd.***, 122 F.3d 99 (2d Cir. 1997).

[7] ***Abramson v. Japan Airlines Co., Ltd.***, 739 F.2d 130, 134 (3d Cir. 1984).

[8] ***Potter v. Delta Airlines, Inc.***, 98 F.3d 881 (5th Cir. 1996).

[9] In ***Eastern Air Lines v. Floyd***, 499 U.S. 530 (1991), the Court held that "purely mental injuries" were not compensable under Article 17 of the Convention. However, the Court declined to decide whether local law was available to compensate a passenger with damages only from mental distress. ("The Court of Appeals did not address this question [of exclusivity] and we did not grant certiorari to consider it. We therefore decline to reach it here.") *Id.* at 553.

[10] *See* supra, note 3.

courts below misread and greatly expanded ***Tseng*** – and thus the preemptive scope of the treaty itself – by holding that the treaty *as amended* now broadly preempts local law even in common law breach-of-contract cases. This holding is based on the fact that such cases do not arise under any of provision of the Warsaw Convention.[11]

Conceding that Mbaba's breach-of-contract claims "do not fit within any of the Convention's substantive liability provisions, i.e., Articles 17, 18, or 19," the district court relied on Article 1(1) to conclude:

> **Nevertheless, the claims are squarely within the preemptive scope of the Convention – the "international transportation of persons, baggage, or goods performed by aircraft for hire."**

App. 21b-22b. In looking to Article 1(1) for guidance on the Convention's preemptive scope, the district court disregarded both the express language of Article 24[12] and this Court's prior observations that it is Article 24 that "prescribes the exclusivity of the Convention's provisions for air carrier liability," not Article 1(1). *See, e.g.*, ***Tseng***, 525 U.S. at 167. Yet, with a single stroke, the trial court

(i) significantly expanded the Convention's preemptive scope;

(ii) effectively changed the word "certain" in the official title of the Convention[13] to "all;" and

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[11] The Warsaw Convention describes and defines three areas of air carrier liability (personal injuries in Article 17; baggage or goods loss, destruction, or damage in Article 18; and damage occasioned by delay in Article 19). ***Tseng***, 525 U.S. 155, 169 (1999); ***Motorola, Inc. v. Fed. Express Corp.***, 308 F.3d 995, 998 (9th Cir. 2002), *cert. denied*, ***Kuehne & Nagel v. Motorola, Inc.***, 538 U.S. 1068 (2003).

[12] Article 24 appears in Chapter III, captioned "Liability of the Carrier" and states in what cases liability is limited by the Convention.

[13] The Warsaw Convention was officially entitled "Convention for the Unification of *Certain* Rules Relating to International Transportation by Air." *See* 49 Stat. 3000 T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted in note to* 49 U.S.C. § 40105 (1997) [emphasis added].

(iii) extinguished entire species of claims assertable by a passenger – whether onboard an aircraft in international flight or, as was Mbaba, merely attempting to enforce a contract with the airline into which he had entered before embarking on his journey.

The court below affirmed. Candidly acknowledging Mbaba's argument that the logical extent of such a holding would be that "[a]n airline could, if it chose, even line up passengers on an international flight and *rob them at gunpoint* without fear of any civil liability to the victims whatsoever," the court conceded that "[r]obbery is not prohibited by the Convention." App. 7a [emphasis in original]. However, the court somewhat inaccurately characterized Mbaba's argument as an "analogy,"[14] described it as "unhelpful," and declined to "consider other scenarios."[15] App. 9a. The Fifth Circuit based its holding largely on Montreal Protocol No. 4's change in the language of Article 24, and expressly relied on a passage from ***Tseng*** that it believed dictated its unprecedented result:

> **[The *Tseng* court] stated that under the amended Article 24, both parties agreed that "[t]he treaty precludes passengers from bringing actions under local law when they cannot establish air carrier liability under the treaty."**

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[14] An analogy is an "inference that if two or more things agree with one another in some respects they will probably agree in others," a "resemblance in some particulars between things otherwise unlike," or a "comparison based on such resemblance." Merriam Webster's 11th Collegiate Dictionary, 2006.

[15] The Fifth Circuit's refusal to consider the logical implications of its unprecedented construction of the Warsaw Convention's preemptive scope as not part of its "task" is remarkable. In construing statutes, courts often consider the logical consequences of competing interpretations as an aid in reaching the correct result. For example, this Court did so in construing Article 3(2) of the Convention in ***Chan v. Korean Air Lines***, 490 U.S. 122, 130 (1989), where the Court rejected the proposed construction that delivering a defective ticket was equivalent to delivering no ticket because such a construction "produces absurd results."

App. 6a, quoting ***Tseng***, 525 U.S. at 175. Disregarding the broader context of this passage and the substantial background leading up to the Court's decision in ***Tseng***, the Fifth Circuit erred in three important ways:

(i) It ignored the Convention's specific limitation of its own scope in Article 24 to damages for death or personal injury, loss or destruction of baggage, and delay;

(ii) It ignored this Court's jurisprudence in ***Tseng*** that the Convention's preemptive effect extends no further than the Convention's "own substantive scope;" and

(iii) It implicitly held that Montreal Protocol No. 4's changes in Article 24 expand the Convention's preemptive scope.

It is important to resolve the issue raised in this petition because of the clear and present conflict which exists among the Circuits. This conflict has arisen in part as a result of the lower courts' misreading of this Court's decision in ***Tseng***, but also in part because of the change in the Convention's language effected by Montreal Protocol No. 4 in 1999. As the court below noted, this Court has not addressed the scope of the Convention's preemption since Montreal Protocol No. 4. App. 5a.

The issue presented by this certiorari petition transcends the facts of this case and has universal applicability to all claims arising out of international transportation by air. The Fifth Circuit's unprecedented holding in the case at bar presages a potential flood of litigation in which newly-emboldened international airlines contend that the Convention permits them to breach contracts and commit non-injury-related torts (or even crimes) against passengers with impunity. Unless resolved by the Court, passengers' rights and remedies with respect to their contracts with international air carriers will remain unsettled. The Court should resolve the exclusivity issue to ensure the clear and consistent application of the terms of a treaty to which the United States is a party.

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS AND TO CLARIFY THE MEANING AND APPLICATION OF A TREATY

The Court has granted certiorari six times since 1985 to ensure the correct interpretation and application of the Warsaw Convention. *See* ***Olympic Airways v. Husain***, 540 U.S. 644 (2004);[16] ***Tseng***, 525 U.S. 155 (1999);[17] ***Zicherman v. Korean Air Lines Co.***, 516 U.S. 217 (1996);[18] ***Eastern Air Lines v. Floyd***, 499 U.S. 530 (1991);[19] ***Chan v. Korean Air Lines***, 490 U.S. 122 (1989);[20] and ***Air France v. Saks***, 470 U.S. 392 (1985).[21] This case raises a recurring, important, and unresolved question regarding the application of a treaty to which the United States is a party. The Court should grant certiorari in this case to resolve a conflict among the circuits and to clarify the preemptive scope of the Convention in an area not addressed by this Court since Montreal Protocol No. 4 changed the language of Article 24 in 1999.

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[16] The Court in ***Husain*** held that a flight attendant's refusal to reseat a passenger farther from the smoking section was an "accident" under Article 17 of the Convention that caused his death.

[17] The Court's decision in ***Tseng*** resolved a conflict between the Second, Third, and Fifth Circuits as to the extent of preemption of local law by Article 17 of the Convention in cases of personal injury.

[18] The Court in ***Zicherman*** held that loss-of-society damages could not be recovered under Article 17 of the Convention for loss of a relative in a plane crash on the high seas.

[19] The Court's decision in ***Floyd*** resolved a conflict between the Eleventh Circuit and the New York Court of Appeals by holding that the term "bodily injury" in Article 17 of the Convention (a translation of the term "lesion corporelle" in the authentic French text) did not allow recovery for "purely mental injuries." ***Floyd***, 499 U.S. at 553.

[20] The Court's decision in ***Chan*** resolved a conflict between the Second and Fifth Circuits and the District of Columbia Circuit as to the correct interpretation of Article 3 of the Convention.

[21] The Court in ***Saks*** held that an injury resulting from a passenger's own internal reaction to the normal operation of an aircraft was not an "accident" within Article 17 of the Convention.

A. The Circuits Are Split on the Issue of Broad Preemption by the Warsaw Convention

The courts below held that, despite the undisputed fact that Mbaba's contract claim does not arise under the Convention, it was nevertheless "squarely within the preemptive scope of the Convention – the 'international transportation of persons, baggage, or goods performed by aircraft for hire.'" App. 21b-22b; App. 9b. In this respect, the Fifth Circuit is in direct conflict with the Seventh Circuit (in a case decided before Montreal Protocol No. 4 was adopted) as to whether a breach-of contract claim is specifically preempted. In a case involving "bumping," the Seventh Circuit held that the claim was not within the preemptive scope of the Convention because it did not involve personal injury, baggage loss or damage, or delay damages, and allowed the claim to proceed under local law. ***Wolgel v. Mexicana Airlines***, 821 F.2d 442, 444 (7th Cir. 1987), *cert. denied*, 484 U.S. 987 (1987).

In ***Wolgel***, the airline made precisely the same argument that Air France made in the case at bar – that "the Warsaw Convention is the [plaintiffs'] exclusive remedy." ***Wolgel***, 821 F.2d at 444. Like the district court in the case at bar, the district court in ***Wolgel*** agreed with the airline and dismissed the passengers' claims for breach of contract. *Id.* Unlike the Fifth Circuit in the case at bar, the Second Circuit in ***Wolgel*** reversed, holding:

> **Because the [plaintiffs'] claims are for total nonperformance of a contract, the Warsaw Convention is inapplicable.**

Wolgel, 821 F.2d at 445. The Second Circuit then remanded the case to the district court for trial. ***Wolgel***, 821 F.2d at 446. This Court denied the airline's petition for certiorari. The decision of the court below demonstrates that this issue is now ripe for review.

The Fifth Circuit is also in conflict with the First, Second, Third, Ninth, and Eleventh Circuits in its more general holding that all claims for which the Convention provides no remedy are broadly preempted merely because they arise in the "international transportation of persons,

baggage, or goods." In an Article 17 case involving a passenger's injury after disembarkation, the First Circuit held that, because the Convention did not apply, the passenger was left "to the remedies of local law." ***Hernandez v. Air France***, 545 F.2d 279, 284 (1st Cir. 1976), *cert. denied*, 430 U.S. 950 (1977).

In an Article 18 case involving loss of cargo (a drug) that occurred at a warehouse that was near, but nonetheless outside, New York's Kennedy Airport, the Second Circuit held that, because the Convention did not apply, the plaintiff could recover damages that were not limited by the Convention's terms. ***Victoria Sales Corp. v. Emery Air Freight, Inc.***, 917 F.2d 705, 707 (2d Cir. 1990). In a similar Article 18 case involving damage to cargo (a machine) taking place during ground transportation that was close to, but clearly outside, London's Heathrow Airport, the Ninth Circuit held that, because the Convention did not apply, determination of the plaintiff's damages was governed by the air waybills issued. ***Read-Rite Corp. v. Burlington Air Express, Ltd.***, 186 F.3d 1190, 1194 (9th Cir. 1999).

In other cases governed by Article 17,[22] the Third and Eleventh Circuits have also held that the Convention did not preempt local law in situations that the Convention does not govern. *See, e.g.*, ***Abramson v. Japan Airlines Co., Ltd.***, 739 F.2d 130, 134 (3d Cir. 1984) (when the Warsaw Convention is inapplicable to the claim raised, "it does not serve as a bar to alternate theories of recovery."); ***Floyd v. Eastern Airlines***, 872 F.2d 1462, 1481 (11th Cir. 1989), *rev'd on other grounds*, 499 U.S. 530 (1991) ("In those aspects of the passenger-carrier relationship which the Convention does not address, it does not apply at all, and local law must govern.").

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[22] As shown in more detail below, while ***Tseng*** held that the proper reading of Article 17 was that *personal injury* claims not covered by the Convention may not be brought under local law, the reasoning of the above courts remains valid to the extent that it can be applied to non-injury cases.

State appellate courts, too, have considered this question and found that the Warsaw Convention does not preempt local law, including the Texas Deceptive Trade Practices Act, the specific statute under which Mbaba sued Air France in the case at bar. *See, e.g.*, ***Imtiaz v. Emery Air Freight, Inc.***, 728 S.W.2d 897 (Tex. App. – Houston [1st Dist.] 1987, no writ).

The Fifth Circuit reads its decision as consistent with that of the Second Circuit in ***King v. American Airlines, Inc.***, 284 F.3d 352 (2d Cir. 2002). App. 9a. Petitioners believe this to be incorrect. In ***King***, the district court held that a passenger's claim that an airline's "bumping" him from a flight was racially motivated fell within the scope of the Warsaw Convention (and, therefore, was preempted) because "bumping" is a delay in international travel within the meaning of the Warsaw Convention's Article 19. *See* ***King v. American Airlines, Inc.***, 146 F. Supp. 2d 159, 162 (N.D.N.Y. 2001). The Second Circuit affirmed the trial court's finding of preemption in ***King***, but on a *different* ground, because "[t]he events in question occurred in the course of embarkation," and therefore fell "within the substantive scope of Article 17." ***King***, 284 F.3d at 358. Importantly, neither the trial court nor the Second Circuit found the ***King*** claim preempted merely because "the events giving rise to the claim occurred in the course of the international carriage of passengers and baggage." However, if the Fifth Circuit is correct in reading its decision as consistent with ***King***, then the conflict between the Circuits is even more profound – with the Second and Fifth Circuits finding complete exclusivity and the First, Third, Seventh, Ninth, and Eleventh Circuits finding only limited exclusivity.

The decision below presents a live, direct conflict between at least the Fifth and Seventh Circuits as to the proper interpretation of the Warsaw Convention and, to the extent not overruled by ***Tseng***, among the First, Second, Third, Ninth, and Eleventh Circuits, as well. The Court should resolve the conflict among the Circuits because denial of certiorari would invite further judicial expansion of the preemptive scope of this treaty and perpetuate the conflict. The decision below affords the Court a ripe opportunity for review of this important issue.

B. The Courts Below Misplaced Their Reliance on Montreal Protocol No. 4's Change in Article 24

In finding broad preemption of all claims not specifically addressed in the Convention, the district court stressed the change in Article 24's language to, "In the carriage of passengers and baggage . . . " from the language previously used, "In the cases covered by Articles 18 and 19. . . ." App. 20b.

> **Article 24 as amended expressly provides in pertinent part that "*any* action for damages, *however founded*, can only be brought subject to the conditions and limitations of this Convention . . .**

App. 20b [emphasis supplied by the court]. The district court noted that the Fifth Circuit had not addressed the issue of the Convention's preemption "in the wake of ***Tseng*** and Montreal Protocol No. 4." App. 20b.

In affirming the district court, the Fifth Circuit likewise stressed the change (App. 8a), and noted:

> **Neither the United States Supreme Court nor the Fifth Circuit has interpreted Article 24 of the Warsaw Convention since it was altered by Montreal Protocol No. 4.**

App. 5a.

The court below noted (App. 6a), but apparently misperceived, this Court's opinion in ***Tseng*** that:

> **Revised Article 24, El Al urges and we agree, merely clarifies, it does not alter, the Convention's rule of exclusivity**

Tseng, 525 U.S. at 175. If the Court was correct in ***Tseng***, then – if the Convention was not intended to broadly preempt local law in all matters *before* the ratification of Montreal Protocol No. 4 in 1999 – it was not altered to do so by Montreal Protocol No. 4. The lower courts' strong suggestion to the contrary was error.

C. The Courts Below Misread *Tseng*

To understand how the courts below misplaced their reliance on ***Tseng*** requires an understanding of the decisional background leading up to ***Tseng***. Most Warsaw Convention preemption cases have involved claims of personal injury or death, including six decisions by this Court in less than 20 years.[23] The First, Second, Third, and Fifth Circuits have also grappled with the issue of preemption in cases not reviewed by this Court – again, almost always in the context of personal injury claims.[24]

It is important to recognize the prevalence of personal injury in the constellation of Warsaw Convention cases because it is easy to overlook – as did the courts below – the fact that when this Court wrote in ***Tseng*** that

> **[t]he treaty precludes passengers from bringing actions under local law when they cannot establish air carrier liability under the treaty . . .**[25]

the Court was announcing this rule in the specific and limited context of personal injury cases *only*.[26] This becomes even more clear when the ***Tseng*** Court's full analysis and interpretation of Article 24 are properly considered.

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[23] *See* ***Husain***, 540 U.S. 644 (2004) (death); ***Tseng***, 525 U.S. 155 (1999) (personal injury); ***Zicherman***, 516 U.S. 217 (1996) (death); ***Floyd***, 499 U.S. 530 (1991) (personal injury); ***Chan***, 490 U.S. 122 (1989) (death); and ***Saks***, 470 U.S. 392 (1985) (personal injury).

[24] *See, e.g.*, ***Wallace v. Korean Airlines***, 214 F.3d 293 (2d Cir. 2000) (personal injury); ***Potter v. Delta Airlines, Inc.***, 98 F.3d 881 (5th Cir. 1996) (personal injury); ***Abramson v. Japan Airlines Co., Ltd.***, 739 F.2d 130, 134 (3d Cir. 1984) (personal injury); ***Hernandez v. Air France***, 545 F.2d 279, 284 (1st Cir. 1976), *cert. denied*, 430 U.S. 950 (1977) (personal injury).

[25] ***Tseng***, 525 U.S. at 175.

[26] The actual holding of ***Tseng*** is much narrower than that suggested by the courts below: "[W]e hold that the Warsaw Convention precludes a passenger from maintaining an action *for personal injury damages* under local law when her claim does not satisfy the conditions for liability under the Convention." ***Tseng***, 525 U.S. at 176 [emphasis added].

The ***Tseng*** Court noted that Article 24 was "not a model of the clear drafter's art" and that its words had been subject to "divergent interpretation." ***Tseng***, 525 U.S. at 168. The lower court had taken the view that "les cas prevus a l'article 17" meant "those cases in which a passenger could actually maintain a claim for relief under Article 17." *Id.* Thus, the Second Circuit had permitted any passenger whose personal injury suit did not satisfy the liability conditions of Article 17 to pursue the claim under local law. *Id.* The ***Tseng*** plaintiff had alleged only mental injuries suffered as a result of an offensive pre-boarding search of her person. ***Tseng***, 525 U.S. at 163-64. Because this Court had held in ***Floyd*** seven years earlier that purely mental injuries were not compensable under the Convention,[27] the Second Circuit's reading of Article 24 would have allowed the ***Tseng*** plaintiff to sue the airline under local law. ***Tseng***, 525 U.S. at 168.

This Court rejected the Second Circuit's view and held instead that –

> **"[L]es cas prevus a l'article 17" refers generically to all personal injury cases stemming from occurrences on board an aircraft or in embarking or disembarking, and simply distinguishes that class of cases (Article 17 cases) from cases involving damaged luggage or goods, or delay (which Articles 18 and 19 address).**

Id. Thus, the Court held that the Convention "precluded a passenger from asserting any *personal injury claims* under local law, including claims that failed to satisfy Article 17's liability conditions. . . ." *Id.* [Emphasis added.]

In this context, it is clear that ***Tseng's*** interpretation of the Convention's preemption precludes the assertion of personal injury claims such as "purely mental injuries" under local law *not* merely because a remedy for mental

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[27] ***Floyd***, 499 U.S. at 553.

injuries is not to be found in the Convention[28] but because Article 17 "refers generically to all personal injury cases" and prescribes strict limits for the recovery of damages therefor. ***Tseng***, 525 U.S. at 168. There is no corresponding article of the Convention that refers generically to "all breach-of-contract cases." Thus, while some kinds of *personal injury* claims are precluded[29] because of the Convention's express intention to uniformitize "*certain* rules,"[30] Petitioners' breach-of-contract claims cannot be broadly preempted by the mere fact that the Convention does not address breaches of contract.

Nothing more clearly demonstrates the extent to which the Fifth Circuit misread ***Tseng*** than the language of ***Tseng*** itself, in which this Court quoted from the Brief of the United States as Amicus Curiae:

> [T]he Convention addresses and concerns, **only and exclusively**, the airline's liability for passenger injuries occurring "on board the aircraft or in the course of any of the operations of embarking or disembarking." Art. 17, 49 Stat. 3018; [citation omitted]. "The Convention's preemptive effect on local law extends no further than the Convention's own substantive scope." [Citation omitted]. A carrier, therefore, **"is indisputably subject to liability under local law for injuries arising outside of that scope. . . ."**

Tseng, 525 U.S. at 171-72. [Emphasis added.] The Fifth Circuit acknowledged this language in the Court's opinion, but dismissed it as "an escalator hypothetical"[31] which, the

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[28] The Court in ***Floyd*** held that the term "lesion corporelle" in Article 17 of the Convention (in the original French text) did not include "purely mental injuries." ***Floyd***, 499 U.S. at 553.

[29] Types of personal injuries for which an international airline passenger may not recover include those not resulting from an "accident" within the meaning of Article 17 and those which are "purely mental injuries."

[30] *See* supra, note 13.

[31] The Court in ***Tseng*** was quoting from the amicus brief of the United States in response to the Second Circuit's stated concern that "a passenger injured by a malfunctioning escalator in the airline's

(Continued on following page)

court held, "does not overcome other passages of ***Tseng*** specifically related to Montreal Protocol No. 4." App. 8a [citation omitted].

II. THE DECISION BELOW CANNOT BE RECONCILED WITH THE VIEW OF THE COURT OF LAST RESORT OF A SISTER SIGNATORY THAT THE TREATY WAS INTENDED TO UNIFY ONLY "CERTAIN" RULES - NOT *ALL* RULES

It has been noted in the past, both by this Court[32] and others,[33] that the drafting history of the Convention includes a proposal made by the Czechoslovak delegation to state in the treaty that, in the absence of a stipulation in the Convention itself, "'the provisions of laws and national rules relative to carriage in each [signatory] State shall apply.'"[34] That proposal was withdrawn upon amendment of the Convention's title to read: "Convention for the Unification of *Certain* Rules Relating to International Transportation by Air." 49 Stat. 3014 (emphasis added); *see* ***Tseng v. El Al Israel Airlines, Ltd.***, 122 F.3d 99, 105 (2d Cir. 1997), *rev'd*, ***Tseng***, 525 U.S. 155 (1999).

In construing the provisions of the Warsaw Convention, the opinions of sister signatories to the treaty are "entitled to considerable weight." ***Air France v. Saks***, 470 U.S. 392, 404 (1985) (internal quotation marks omitted). The British House of Lords, in ***Sidhu v. British Airways plc***, [1997] 1 All E.R. 193, considered that inclusion of the word "certain" in the Convention's title

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terminal would have no duty to keep the escalator in proper repair." ***Tseng***, 525 U.S. at 171-72.

[32] ***Tseng***, 525 U.S. at 173.

[33] *See, e.g.*, ***Tseng v. El Al Israel Airlines, Ltd.***, 122 F.3d 99, 105 (2d Cir. 1997), *rev'd*, ***Tseng***, 525 U.S. 155 (1999).

[34] Second International Conference on Private Aeronautical Law, October 4-12, 1929, Warsaw, Minutes 176 (R. Horner & D. Legrez transls. 1975).

accurately indicated that "the Convention is concerned with certain rules only, not with all the rules relating to international carriage by air." *Id.*, at 204. For example, the Convention does not say "anything . . . about the carrier's obligations of insurance, and in particular about compulsory insurance against third party risks." *Id.* The Convention, in other words, is "a partial harmonization, directed to the particular issues with which it deals." *Id.* As to those issues, the Lords concluded, "the aim of the Convention is to unify." *Id.* Pointing to the overall understanding that the Convention's objective was to "ensure uniformity," *id.*, at 209, the Lords suggested that the Czechoslovak delegation may have meant to underscore that national law controlled "chapters of law relating to international carriage by air with which the Convention was not attempting to deal." *Id.*

The Second Circuit in ***Tseng*** based its decision to allow the plaintiff to pursue her local law claims for mental injuries not governed by the Convention in part on this history. ***Tseng***, 525 U.S. at 174. In reversing the Second Circuit, this Court opined that "the withdrawn Czechoslovak proposal will not bear the weight the Court of Appeals placed on it." *Id.* However, it will easily bear the considerably *smaller* weight that Mbaba proposes to place upon it here.

CONCLUSION

In summary, the court below incorrectly decided a recurring, important question of treaty law on which the courts of the United States are in disarray. The proper interpretation of this treaty is a matter of importance to all international air carriers, to the millions of people who travel internationally by air each day, and to the courts. Review by the Court is necessary to resolve the conflict among the Circuit Courts of Appeals, to ensure the uniform and proper application of this treaty, and to settle a recurring, significant issue concerning the application of the treaty in the aftermath of the amendments effected by Montreal Protocol No. 4.

PRAYER

For these reasons, Petitioners pray that their petition for a writ of certiorari be granted.

Respectfully submitted,

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Dated: October 23, 2006

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-20452

EDO GEORGE MBABA; PATIENCE MBABA

Plaintiffs-Appellants,

v.

SOCIETE AIR FRANCE, doing business as Air France,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

(Filed July 25, 2006)

Before JONES, Chief Judge, and BARKSDALE and BENAVIDES, Circuit Judges.

BENAVIDES, Circuit Judge:

This case concerns the preemptive effect of the Warsaw Convention as amended by Montreal Protocol No. 4. The Appellant, Edo George Mbaba, argues that his claims stemming from excess baggage fees are not preempted because such injuries are not contemplated by the Convention. The Appellee, Societe Air France ("Air France"), argues that Mbaba's claims are preempted due to the Convention's broad exclusivity. As explained below, the Convention's text and Supreme Court precedent inform our conclusion that the claims are preempted.

I. FACTUAL AND PROCEDURAL BACKGROUND

Mbaba purchased a ticket to travel on Air France from Houston, Texas to Lagos, Nigeria. The trip was scheduled for June 15, 2002, and included a layover in Paris, France. Mbaba bought the ticket from Federal Express, his employer. The parties dispute whether Federal Express sold Mbaba a "non-revenue" (complimentary) ticket. When Mbaba checked in for the flight in Houston, he paid a $520.00 excess baggage fee, $130.00 for each of his four extra bags. His baggage ticket indicated that the bags were to be transported from Houston to Lagos.

In Paris, Air France unloaded Mbaba's baggage. Air France says that it had to do this because Mbaba was a non-revenue passenger. Meanwhile, Mbaba missed the scheduled flight to Lagos. Mbaba reclaimed the baggage and spent a night in the airport terminal waiting for the next flight. The next day, when Mbaba checked in for the new Lagos flight, an agent said Mbaba would have to pay $4048.66 for the extra bags. In Paris, Air France charges excess baggage fees based upon the weight of the bags. Mbaba alleges that the agent refused to let him send the bags back to Houston and said that if Mbaba did not pay the charge, the bags would be "taken out and burned." Mbaba payed the fee with a credit card.

Mbaba filed this suit against Air France in Texas state court, alleging breach of contract, violation of the Texas Deceptive Trade Practices Act, and common law fraud. Air France removed the case to federal court. After a period of discovery, the district court granted summary judgment to Air France, holding that the Warsaw Convention pre-empted Mbaba's state law claims. Mbaba appealed.

II. STANDARD OF REVIEW

This Court reviews a district court's grant of a summary judgment *de novo,* applying the same standards as the district court. *Hirras v. Nat'l R.R. Passenger Corp.,* 95 F.3d 396, 399 (5th Cir. 1996). The evidence should be viewed in the light ~~most~~ favorable to the nonmoving party, and the record should not indicate a genuine issue as to any material fact. *Am. Home Assurance Co. v. United Space Alliance,* 378 F.3d 482, 486 (5th Cir. 2004).

III. DISCUSSION

A. The Warsaw Convention

This case presents the first opportunity for this Court to interpret the language of the Warsaw Convention as amended by Montreal Protocol No. 4. *See* Convention for the Unification of Certain Rules Relating to International Transportation By Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934) (as amended by Montreal Protocol No. 4, *as reprinted in* S. Rep. No. 105-20, at 21-32 (1998)) ("Warsaw Convention"). The "cardinal purpose" of the Warsaw Convention is "to achieve uniformity of rules governing claims arising from international air transportation." *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng,* 525 U.S. 155, 169 (1999). It applies to "all international transportation of persons, baggage, or goods performed by aircraft for hire." Warsaw Convention, *as reprinted in* S. Rep. No. 105-20, at 21 (Article 1).

The language at issue is in Paragraph 1 of Article 24. It states:

> 1. In the carriage of passengers and baggage, any action for damages, however founded, can

> only be brought subject to the conditions and limits set out in this Convention, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.

Id. at 29. The language in Paragraph 2 of Article 24 offers some guidance in interpreting Paragraph 1. It states:

> 2. In the carriage of cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and limits of liability set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. Such limits of liability constitute maximum limits and may not be exceeded whatever the circumstances which gave rise to the liability.

Id. at 29. This version became binding in the United States March 4, 1999, after adoption of Montreal Protocol No. 4. *Tseng,* 525 U.S. at 175 n.14. The previous version of Article 24 stated:

> 1. In the cases covered by articles 18 and 19 any actions for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.
>
> 2. In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

Warsaw Convention, *as reprinted in* note following 49 U.S.C. § 40105, at 11 (2000). It is undisputed that the

alleged damages suffered by Mbaba do not fall within the language of Articles 17, 18, or 19. Article 17 describes carrier liability for death or bodily injury. Warsaw Convention, *as reprinted in* S. Rep. No. 105-20, at 26. Article 18 describes carrier liability for damage to passenger baggage. *Id.* Article 19 describes carrier liability for damage caused by delay in transportation of "passengers, baggage, or goods." *Id.*

Montreal Protocol No. 4 deals primarily with rules relating to cargo transportation. *Id.* at 1. For example, it reduces paperwork that must accompany cargo and redefines cargo liability. *Id.* at 3-4. The protocol languished for more than twenty years in the Senate, because Senators objected to liability limits for personal injuries and death that would be triggered by its adoption. *Id.* at 2. In 1997, the Department of Transportation approved an inter-airline agreement that waived the Convention's limits, which led to the Senate's reconsideration of the protocol. *Id.*

B. *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*

Neither the United States Supreme Court nor the Fifth Circuit has interpreted Article 24 of the Warsaw Convention since it was altered by Montreal Protocol No. 4. The Supreme Court, however, reviewed the prior version in *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155 (1999).

Tseng sought damages for psychic and psychosomatic injuries resulting from "an intrusive security search" before she boarded an El Al Israel Airlines flight. *Id.* at 160. The case presented a question of the Convention's exclusivity, given that the Convention did not address

psychological injuries. *Id.* The Court found that the Convention barred Tseng's recovery, holding that recovery for a personal injury "not allowed under the Convention, is not available at all." *Id.* at 161.

The Court reasoned that recourse to local law would undermine the Convention's purpose – uniformity of air carrier liability. *Id.* at 161. It relied on language in Article 1 that made the Convention apply to "all international transportation" and Article 24, as written before adoption of Montreal Protocol No. 4. *Id.* at 162. The Court found that Article 24 was part of "a compromise between the interests of air carriers and their customers" that restricted the claims those customers could pursue. *Id.* at 170-71. It also explained that an interpretation allowing Tseng's claims would lead to "several anomalies," including cases where passengers injured physically would be subject to liability limits while passengers merely traumatized would not. *Id.* at 171. Finally, the Court concluded that other treaty signatories had interpreted the Convention as an exclusive remedy. *Id.* at 176.

The Court also addressed Montreal Protocol No. 4, which at the time of the decision had been ratified but had not taken effect. *Id.* at 174. It stated that under the amended Article 24, both parties agreed that "[t]he treaty precludes passengers from bringing actions under local law when they cannot establish air carrier liability under the treaty." *Id.* at 175. Indeed, Tseng "concede[d]" that under the protocol she would have "no recourse to an alternate remedy." *Id.* at 160-61. The Court said that the protocol "clarifies, but does not change, the Convention's exclusivity domain." *Id.* at 161. Justice Stevens, the only dissenting member of the Court, also assumed that the protocol clarified the exclusivity of the Convention. *Id.* at

177 (Stevens, J., dissenting) (describing his disagreement as having limited significance because "the issue has been conclusively determined for future cases by the recent amendment [Montreal Protocol No.4] to the Warsaw Convention").

C. Analysis

Mbaba argues that his claims cannot be preempted because his injuries are not contemplated by the Convention. He focuses on the fact that his injury is not even within the broad categories of the Convention: personal injury, lost or damaged baggage, or delay. He suggests that the district court's holding in effect means that "unless an injury is specified in the Warsaw Convention, there can be no remedy for it." *Id.* He makes this point with an analogy: "An airline could, if it chose, even line up passengers on an international flight and *rob them at gunpoint* without fear of any civil liability to the victims whatsoever." Robbery is not prohibited by the Convention.

Mbaba supports his argument with the text of Article 24, specifically the language stating that claims "can only be brought subject to the conditions and limits set out in this Convention." He also relies on a portion of *Tseng* relating to a hypothetical involving an escalator. *Tseng,* 525 U.S. at 171-72. The hypothetical came from Tseng's Court of Appeals decision. The Second Circuit reasoned that if the Convention excluded Tseng's claims "then a passenger injured by a malfunctioning escalator in the airline's terminal would have no recourse against the airline, even if the airline recklessly disregarded its duty to keep the escalator in proper repair." *Id.* at 171. In response, the Supreme Court stated, "[T]he Convention's

preemptive effect on local law extends no further than the Convention's own substantive scope. A carrier, therefore, is indisputably subject to liability under local law for injuries arising out of that scope: *e.g.*, for passenger injuries occurring before any of the operations of embarking or disembarking."[1] *Id.* at 172 (internal quotation marks omitted). Finally, Mbaba relies on statements made by Senator Biden that describe Montreal Protocol No. 4. as "simplify[ing] cargo rules" without making "controversial" changes. *See* 144 CONG. REC. S11059-02 (1998).

Mbaba's argument fails to overcome the text of the Convention and *Tseng*. First, the text of Article 24 specifically preempts claims resulting from the carriage of baggage "however founded."[2] Second, the language in *Tseng* surrounding the escalator hypothetical does not overcome other passages of *Tseng* specifically related to Montreal Protocol No. 4. *Tseng*, 525 U.S. at 175 (describing the amended Convention as "preclud[ing] passengers from

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[1] Mbaba asks this Court to interpret "scope," as used in *Tseng*, as pertaining to the types of claims contemplated by the Convention. Such an interpretation, however, would directly contradict the ultimate holding in *Tseng*, which precluded claims for psychological injuries because the Convention did not include them. The Supreme Court appears to use the term "scope" to describe the specified parameters of the Convention. Indeed, Article 17 states that a carrier is liable for death or injuries that take place "onboard" or while "embarking or disembarking." Warsaw Convention, *as reprinted in* S. Rep. No. 105-20, at 26; *see also Acevedo-Reinoso v. Iberia Lineas Aereas de Espana S.A.*, 449 F.3d 7, 14 (1st Cir. 2006) (remanding for a determination of whether the alleged injury "occurred on board the airplane or in the process of embarking or disembarking").

[2] The amended version of Paragraph 1 uses the more broad language of "In the carriage of passengers and baggage" rather than the previously used "In the cases covered by articles 18 and 19." *Supra* Part III.A.

bringing actions under local law when they cannot establish air carrier liability under the treaty"). Third, Senator Biden's comments are unpersuasive as they speak only to the general characteristics of the protocol. Finally, Mbaba's recitation of analogies is unhelpful. Our task is to review the Convention in relation to a tariff on the carriage of baggage. We will not consider other scenarios.

Our decision conforms with the view taken by the Second Circuit in *King v. American Airlines, Inc.*, 284 F.3d 352 (2d Cir. 2002). In *King*, the court held that the Warsaw Convention preempted a discrimination claim based on an allegation that the plaintiffs were bumped from a flight because of their race. *Id.* at 358. The *King* Court noted that the Supreme Court in *Tseng* "held that the Convention's preemptive effect on local law extends to all causes of action . . . regardless of whether a claim actually could be maintained under the provisions of the Convention." *Id.* at 357.

For these reasons, the Warsaw Convention preempts Mbaba's claims. To hold otherwise would undermine the Convention's goal of uniformity. *See Tseng*, 525 U.S. at 169 ("Given the Convention's comprehensive scheme of liability rules and its textual emphasis on uniformity, we would be hard put to conclude that the delegates at Warsaw meant to subject air carriers to the distinct, nonuniform liability rules of the individual signatory nations."). Because we affirm on this ground, we do not reach Air France's alternative arguments.

IV. CONCLUSION

Based on the text of the Warsaw Convention and the language in *Tseng*, we hold that Mbaba's claims are

preempted. Accordingly, his injuries are not actionable in the courts of the United States. We affirm the district court's grant of summary judgment.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

EDO GEORGE MBABA et ux PATIENCE MBABA,	§	
Plaintiffs,	§	CIVIL ACTION
v.	§	NO. H-03-5430
SOCIETÉ AIR FRANCE, s/h/a AIR FRANCE AIRLINE,	§	
Defendant.	§	

MEMORANDUM AND ORDER

This matter is before the Court on Defendant Societe Air France, s/h/a Air France Airline's Renewed Motion for Summary Judgment [Doc. # 29] ("Air France's Motion"). Plaintiff Edo George Mbaba ("Mbaba") has filed a response on his and his wife's behalf [Doc. # 30]. Air France has replied [Doc. # 32]. Having considered the parties' submissions, all matters of record, and applicable legal authorities, the Court concludes that Air France's Motion should be **granted**.[1]

I. BACKGROUND FACTS

Mbaba bought a ticket for travel on June 15, 2002 on Air France Airline from Houston, Texas to Lagos, Nigeria,

[1] The Court also has received Mbaba's Motion to Compel and for Sanctions [Doc. # 33]. This Motion is **denied as moot**.

with a stopover in Paris, France. Mbaba bought his ticket through his employer, Federal Express. The parties dispute whether Mbaba was a "non-revenue passenger" traveling on a complimentary ticket provided to Federal Express employees that required him to pay various charges, including excess baggage charges.[2] There is no dispute that when Mbaba checked in for his flight in Houston, he paid a $520.00 excess baggage fee.[3] He was given an excess baggage ticket indicating the bags were to be transported from Houston to Lagos. When Mbaba arrived in Paris, he was informed by the Air France agent that he would have to pay an additional $4,048.66 excess baggage charge for the transport of his bags from Paris to Lagos.[4] Perceiving that he had no other option,[5] Mbaba paid the charge under strident protest.

Mbaba filed suit against Air France in state court in Harris County, Texas alleging breach of contract, violation of the Texas Deceptive Trade Practices Act, and common law fraud. Air France removed the case to this court pursuant to the Foreign Sovereign Immunities Act. Air France now moves for summary judgment on the grounds that Mbaba's state law causes of action are preempted by the Warsaw Convention.

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[2] Federal Express provides employees the benefit of purchasing air travel through Federal Express at discount prices. Mbaba paid Federal Express $1,167.26 for his ticket. There is no evidence concerning how much Federal Express paid Air France for the ticket or the retail price of the ticket.

[3] This fee was based on a charge of $130.00 per excess bag.

[4] This fee was based on the weight of the excess bags.

[5] Mbaba alleges that the Paris gate agent told him "if you do not pay the charge, your bags will be taken outside and burned." Mbaba Affidavit, ¶ 5, Exhibit A to Mbaba's response.

II. SUMMARY JUDGMENT STANDARDS

Rule 56 of the Federal Rules of Civil Procedure mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing of the existence of an element essential to the party's case, and on which that party will bear the burden at trial. *Baton Rouge Oil & Chem. Workers Union v. ExxonMobil Corp.*, 289 F.3d 373, 375 (5th Cir. 2002) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

In deciding a motion for summary judgment, the Court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Calbillo v. Cavender Oldsmobile, Inc.*, 288 F.3d 721, 725 (5th Cir. 2002). "An issue is material if its resolution could affect the outcome of the action." *Terrebonne Parish Sch. Bd. v. Columbia Gulf Transmission Co.*, 290 F.3d 303, 310 (5th Cir. 2002) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). In deciding whether a fact issue has been created, the facts and the inferences to be drawn from them must be reviewed in the light most favorable to the nonmoving party. *Hotard v. State Farm Fire & Cas. Co.*, 286 F.3d 814, 817 (5th Cir. 2002). However, factual controversies are resolved in favor of the nonmovant "only when an actual controversy exists – that is, when both parties have submitted evidence of contradictory facts." *Olabisiomotosho v. City of Houston*, 185 F.3d 521, 525 (5th Cir. 1999).

The party moving for summary judgment has the initial burden of demonstrating the absence of a material fact issue with respect to those issues on which the movant bears the burden of proof at trial. *Smith v. Brenoettsy*, 158 F.3d 908, 911 (5th Cir. 1998). The movant meets this initial burden by showing that the "evidence in the record would not permit the nonmovant to carry its burden of proof at trial." *Id.* If the movant meets this burden, "the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 282 (5th Cir. 2001) (quoting *Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995)). "A dispute over a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* (quoting *Brenoettsky*, 158 F.3d at 911 (5th Cir. 1998) (internal quotation marks omitted)); *see also Quorum Health Res., L.L.C. v. Maverick County Hosp. Dist.*, 308 F.3d 451, 458 (5th Cir. 2002).

The nonmovant's burden is not met by mere reliance on the allegations or denials in the nonmovant's pleadings. *See Morris v. Covan Worldwide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998); *Diamond Offshore Co. v. A&B Builders, Inc.*, 302 F.3d 531, 545 n.13 (5th Cir. 2002) (noting that "unsworn pleadings do not constitute proper summary judgment evidence," citing *Johnston v. City of Houston*, 14 F.3d 1056, 1060 (5th Cir. 1994)). Likewise, "unsubstantiated or conclusory assertions that a fact issue exists" do not meet this burden. *Morris*, 144 F.3d at 380. Instead, the nonmoving party must present specific facts which show "the existence of a genuine issue concerning every essential component of its case." *Id.* In the absence of any proof, the court will not assume that the nonmovant

could or would prove the necessary facts. *McCallum Highlands, Ltd. v. Washington Capital Dus, Inc.*, 66 F.3d 89, 92 (5th Cir. 1995), *revised on other grounds upon denial of reh'g*, 70 F.3d 26 (5th Cir. 1995); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).

III. ANALYSIS

Air France contends that the treaty known popularly as the Warsaw Convention[6] preempts all of Mbaba's state law claims and requires dismissal of this case in its entirety. Mbaba argues that because his claim is not one for personal injuries within the scope of Article 17, for lost baggage within the scope of Article 18, or delay within the scope of Article 19, the claim is outside the scope of the Warsaw Convention altogether and is not preempted. Mbaba further argues that the Warsaw Convention provides for application of local law in cases of "willful misconduct."[7]

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[6] Convention for the Unification of Certain Rules Relating to International Transportation By Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, note following 49 U.S.C. § 40105.

[7] Mbaba also objects to Air France's summary judgment evidence. Mbaba objects to Air France's Exhibit B, Plaintiffs' First Amended Original Petition filed in state court, on the grounds that pleadings are not competent summary judgment evidence. Air France submits the pleading not as evidence in support of any fact in issue, but to establish the allegations Mbaba is making in this case. The Court may take judicial notice of the contents of the First Amended Original Petition, which is a matter of record in this case. Mbaba's objection to Exhibit B is **overruled**. Mbaba objects to Air France's Exhibit C, "Legal Notices/General Conditions of Carriage by Air France," as not properly authenticated by affidavit and as hearsay. Contrary to Mbaba's objection, Exhibit C was authenticated by the Affidavit of Jeromy Hughes, attached to Air France's Motion. Exhibit C is a business record

(Continued on following page)

"The cardinal purpose of the Warsaw Convention . . . is to achieve uniformity of rules governing claims arising from international air transportation." *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 169 (1999). Article 24 of the Warsaw Convention, as modified by the

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of Air France and is admissible under Federal Rule of Evidence 803(6). Mbaba objects to Air France Exhibit D, the Affidavit of Gregory J. Kozlowski, on the grounds that it contains blanks and a referenced tariff is not attached. The Affidavit is clearly incomplete. The Affidavit is not admissible as to any statement that contains a blank. The Affidavit, however, contains numerous admissible statements that are within Kozlowski's personal knowledge as Assistant United States Counsel for Air France. Kozlowski testifies that he has personal knowledge of the tariff applicable between June 15, 2002 and June 17, 2002. He can testify as to the contents of that tariff based on his personal knowledge without attaching the tariff itself. Mbaba's objections to Exhibit D are **overruled in part and sustained in part.** Finally, Mbaba objects to Air France's Exhibit E, the Affidavit of Billie Snow. The Snow Affidavit contains certain statements that are speculative and without foundation. Mbaba's objection to the following statement in paragraph 4 of the Snow Affidavit is **sustained**: "When the agent issued a baggage charge all the way to Lagos, it was done as a courtesy, in hopes that a sympathetic agent in Charles De Gualle airport in Paris, France would accept the coupon for payment to the final destination" is sustained. Mbaba's objection is also sustained as to the statement in paragraph 5 of the Snow Affidavit, that "He [Mbaba] was well aware that he had to collect his luggage at Charles De Gaulle airport in France and recheck it again for the Lagos leg of his trip," and that "[i]t appears that Mr. Mbaba was not an actual airline employee, but nevertheless obtained non-revenue travel tickets." The remainder of the Snow Affidavit is admissible. Mbaba's objection to Exhibit E accordingly is **overruled in part and sustained in part.**

Air France's hearsay objection (contained in its Reply) to Mbaba's testimony in his Affidavit as to what an unnamed Air France agent in Houston told him is **overruled.**

Montreal Protocol No. 4 (effective March 4, 1999),[8] provides:

> 1. In the carriage of passengers and baggage, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.
>
> 2. In the carriage of cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and limits of liability set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. Such limits of liability constitute maximum limits and may not be exceeded whatever the circumstances which gave rise to the liability.[9]

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[8] Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air ("Montreal Protocol"). *See* Cong. Rec. S11059-02 (Sept. 28, 1998).

[9] The prior version of Article 24 provided:

> (1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> (2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

Id. at 163.

The Warsaw Convention applies to "all international transportation of persons, baggage, or goods performed by aircraft for hire." *Id.* at 162 (citing Article 1(1) of the Warsaw Convention). A passenger asserting a claim subject to the Warsaw Convention is limited to damages for bodily injuries suffered as a result of an accident (Article 17), damages resulting from baggage or goods destruction, loss or damages (Article 18), or loss caused by delay (Article 19). *Id.* at 162-63, 169.

Tseng was a case involving claims for psychological personal injuries caused by a 15-minute airline security officer's search of plaintiff's body and luggage prior to her boarding an international flight. In addressing the Warsaw Convention as written prior to the Montreal Protocol No. 4, the *Tseng* Court read Article 24 in conjunction with Article 17, which governs claims for personal injuries. The Supreme Court held that no recovery outside the scope of the Convention was allowed for an international traveler's personal injury incurred "on board the aircraft or in the course of any of the operations of embarking or disembarking." *Id.* at 160-61, 171-72. The Court held generally that suit by international travelers for personal injuries had to be asserted under the Convention; the Convention is the international traveler's exclusive remedy. *Id.* at 176. The Court further noted that the Montreal Protocol No. 4 amended Article 24, and (as agreed by the parties) made the Convention's preemptive effect "clear." *Id.* at 174-75. "The treaty precludes passengers from bringing actions under local law when they cannot establish air carrier liability under the treaty. Revised Article 24 . . . merely clarifies, it does not alter, the Convention's rule of exclusivity." 525 U.S. at 175. "Recourse to local law . . . would undermine the uniform regulation of international air

carrier liability that the Warsaw Convention was designed to foster." *Id.* at 161. "Given the Convention's comprehensive scheme of liability rules and its textual emphasis on uniformity, we would be hard put to conclude that the delegates at Warsaw meant to subject air carriers to the distinct, nonuniform liability rules of the individual signatory nations." *Id.* at 169.

In *King v. American Airlines, Inc.*, 284 F.3d 352, 358 (2d Cir. 2002), the Second Circuit held the plaintiffs' discrimination claim based on their allegation that they were bumped from an international flight because of their race was preempted by the Warsaw Convention. Holding that "[t]he Kings' discrimination claim is preempted by the Warsaw Convention if the events giving rise to the claim occurred in the course of the international 'carriage of passengers and baggage,' regardless of whether the original or amended Article 24 controls," *Id.* at 358,[10] the

[10] In so ruling, the *King* court however made questionable statements about the scope of preemption arising from the Convention. Although ruling in a case that arose after the effective date of the Montreal Protocol No. 4, the *King* court stated that "the events in question occurred in the course of embarkation, and . . . [the claim] therefore falls within the substantive scope of Article 17." *Id.* at 358. The court of appeals also stated that the claims in issue were "preempted by Article 17." *Id.* at 359, 360. Those comments are not binding on this Court, nor determinative of the outcome of the case at bar. A full reading of the *King* opinion demonstrates that the Second Circuit did not intend to limit the preemptive force of the Convention to claims on which recovery is available under Article 17, which covers claims for "bodily injury" occurring in an "accident" "in the course of any of the operations of embarking or disembarking." The *King* court did not include Article 17's liability requirements of "bodily injury" and "accident" within the scope or preemption that the court concluded existed. *See also Gibbs v. American Airlines, Inc.*, 191 F. Supp. 2d 144, 147-48 (D.D.C. 2002) (finding § 1981 discrimination claim preempted under pre-Montreal Protocol Article 24).

Second Circuit reinforced the principle that the Convention is the sole source of a remedy for damages sought by an international traveler against an airline.

Article 24 as amended by the Montreal Protocol No. 4 was in effect at the time of the events in issue in the case at bar. The Fifth Circuit has not addressed preemption pursuant to the Warsaw Convention in the wake of *Tseng* and the Montreal Protocol No. 4.[11] Nevertheless, the Court concludes that Mbaba's claims are preempted by these authorities. Article 24 as amended expressly provides in pertinent part that "*any* action for damages, *however founded*, can only be brought subject to the conditions and limits set out in this Convention . . . " (emphasis added). The Court is bound by the Warsaw Convention's language which expressed "the shared expectations of the contracting parties." *Tseng*, 525 U.S. at 167 (quoting *Air France v. Saks*, 470 U.S. 392, 399 (1985)). Article 24 must be read in conjunction with Article 1(1), which provides that the Convention governs liability in "all international transportation of persons, baggage, or goods performed by aircraft for hire." To the extent *Tseng*'s reference to Articles 17, 18 and 19 apply to events after the effective date of the Montreal Protocol No. 4 in the United States (March 4, 1999), which is questionable, only the temporal and spacial limitations found within those substantive liability provisions will guide (and possibly restrict) the scope of the Convention's preemption. *See Tseng*, 525 U.S. at 171-72, 174-75, 176. For instance, as to claims for

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[11] The Fifth Circuit previously ruled that the Warsaw Convention's preemptive force extended even to claims for personal injuries that fall outside the coverage of Article 17 in *Potter v. Delta Airlines, Inc.*, 98 F.3d 881, 884-85 (5th Cir. 1996).

personal injuries, the preemptive effect of the Convention reaches events that occur in connection with "embarking," "disembarking," or while "onboard" the aircraft, as these terms are used in Article 17 of the Convention. *See id.*; *Marotte v. American Airlines, Inc.*, 296 F.3d 1255, 1260 (11th Cir. 2001); *King*, 284 F.3d at 358-60; *Buonocore v. Trans World Airlines, Inc.*, 900 F.2d 8, 10 (2d Cir. 1990) (same). Claims for damage to "registered baggage," are encompassed by the Convention "if the occurrence which caused the damage . . . took place *during the carriage by air.*"[12] Warsaw Convention, Art. 18. Finally, carriers are liable for damage occasioned by delay if the delay is "in the transportation by air of passengers, baggage, or goods." *Id.*, Art. 19.

Mbaba sues Defendant for breach of contract, violation of the Texas Deceptive Trade Practices Act, Tex. Bus. & Comm. Code, §§ 17.46(b)(3), 17.50(a)(3), and common law fraud to recover allegedly excessive baggage fees charged during his stop-over in Paris on his trip from Houston to Lagos. During that stop, Mbaba was required to retrieve his bags, wait to obtain a seat for the second leg of the trip (because he was traveling "stand-by" on that leg), and then re-check his luggage. Mbaba's claims do not fit within any of the Convention's substantive liability provisions, *i.e.*, Articles 17, 18, or 19. Nevertheless, the claims are squarely within the preemptive scope of the Convention – the "international transportation of persons,

[12] "Carriage by air" is defined in Article 18(4) to be: "The carriage by air within the meaning of the preceding paragraphs of this Article comprises the period during which the baggage or cargo is in the charge of the carrier, whether in an airport or on board an aircraft or, in the case of a landing outside an airport, in any place whatsoever."

baggage, or goods performed by aircraft for hire." Warsaw Convention, Art. 1(1); *see Tseng*, 525 U.S. at 171-72. The events at issue indisputably occurred in immediate temporal and physical proximity to Mbaba's international travel. He incurred the damages claimed when he presented his luggage to be checked and loaded onto Defendant's airplane for international transportation of that baggage on his final flight to Lagos.[13] Mbaba's claimed injury was inflicted by Defendant's agents while in the airport dealing with the international transportation of Mbaba and his baggage. Therefore, Mbaba's state law claims are preempted.

Mbaba also contends that the Warsaw Convention does not preempt claims based on "willful misconduct." This contention is unavailing. Article 25 of the Warsaw Convention provides:

> In the carriage of passengers and baggage, the limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or

[13] The cases cited by Mbaba in which plaintiffs were allowed to pursue state law claims are inapposite. These cases involved damage to baggage that occurred outside of the airport, either in ground transportation or in a warehouse. *See Read-Rite Corp. v. Burlington Air Express, Ltd.*, 186 F.3d 1190, 1194 (9th Cir. 1999); *Victoria Sales Corp. v. Emery Air Freight, Inc.*, 917 F.2d 705, 707 (2d Cir. 1990). Thus, the events did not arise in connection with "international transportation" of the baggage by an airline. More significant, these cases do not address preemption under Article 24 of the Warsaw Convention as amended by the Montreal Protocol No. 4.

> agent, it is also proved that he was acting within the scope of his employment.

Article 25, by its express language, removes the damages cap on air carrier liability when a defendant has engaged in intentional misconduct. "The Warsaw Convention provides the exclusive remedy for claims arising out of a carrier's intentional misconduct." *Dazo v. Globe Airport Security Services*, 295 F.3d 934, 940 (9th Cir. 2002) (citing *Carey v. United Airlines*, 255 F.3d 1044, 1051 (9th Cir. 2001)). "If a plaintiff establishes wilful misconduct by the carrier, Article 25 lifts the Convention's limits on liability, but the Convention remains the exclusive source for the plaintiff's remedy." *Id.* The preemption ruling in *Tseng* has been held to be "all encompassing – there is no exception for an injury suffered as a result of intentional misconduct," *Carey*, 255 F.3d at 1051. Article 25 does not create an exception to preemption. *See also Bloom v. Alaska Airlines*, 36 Fed. Appx. 278, 280 (9th Cir. 2002) (holding that the Warsaw Convention creates no exception for intentional conduct). Mbaba's intentional tort state law claims are preempted and he cannot obtain recovery for the fees and damages about which he complains.

IV. CONCLUSION AND ORDER

Mbaba's state law claims are preempted by the Warsaw Convention. Accordingly, the complaint in this case must be dismissed.[14] It is therefore

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[14] Mbaba has not asserted a claim pleaded expressly under the Warsaw Convention in his First Amended Original Petition, the operative pleading in this case. The facts alleged in that pleading, as well as in Mbaba's Affidavit submitted in opposition to the summary

(Continued on following page)

ORDERED that Defendant Society Air France, s/h/a Air France Airline's Motion for Summary Judgment [Doc. # 29] is **GRANTED**. It is further

ORDERED that Defendant Society Air France, s/h/a Air France Airline's Motion for Separate Trials [Doc. # 32] is **DENIED as moot**. It is further

ORDERED that Plaintiffs' claims are **DISMISSED with prejudice**. It is further

ORDERED that Mbaba's Motion to Compel and for Sanctions [Doc. # 33] is **DENIED as moot**.

The Court will issue a separate final judgment.

SIGNED at Houston, Texas this **29th** day of **March, 2005.**

/s/ Nancy F. Atlas
Nancy F. Atlas
United States District Judge

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judgment motion, demonstrate that he cannot do so under the substantive liability provisions of the Convention, Articles 17, 18 or 19. Thus, leave to amend is not warranted.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EDO GEORGE MBABA et ux PATIENCE MBABA,	§	
Plaintiffs,	§	CIVIL ACTION
v.	§	NO. H-03-5430
SOCIETE AIR FRANCE, s/h/a AIR FRANCE AIRLINE,	§	
Defendant.	§	

FINAL JUDGMENT

In accordance with the Memorandum and Order issued this day granting Defendant Society Air France, s/h/a Air France Airline's Motion for Summary Judgment [Doc. # 29], it is hereby

ORDERED, ADJUDGED AND DECREED that Plaintiffs EDO GEORGE MBABA and PATIENCE MBABA's claims in this case are **DISMISSED with prejudice.**

This is a **FINAL JUDGMENT.**

SIGNED at Houston, Texas this 29th day of **March, 2005.**

/s/ Nancy F. Atlas
Nancy F. Atlas
United States District Judge

No. 06-566

In The
Supreme Court of the United States

EDO GEORGE MBABA and PATIENCE MBABA,

Petitioners,

v.

SOCIETE AIR FRANCE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Issue 1: Whether the Warsaw Convention precludes Petitioners' claims.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed in the caption.

(1) Respondent Société Air France ("Air France") was previously at all material times an "agency or instrumentality of a foreign state" within the meaning of 28 U.S.C. § 1603, because a majority of its shares have been at all material times owned by the Government of France.

(2) Respondent Air France's subsidiaries and known affiliates are:

Société Air France (a/k/a Air France)
Air Charter
Groupe Jet Tours
Go Voyages
Groupe Servair
Air Inter
EuroBerlin
Ecole de Pilotage Amaury de la Grange
REVIMA
CRMA
Esterel
Sodetair
Societe Immobiliere Aeroportuaire
GIE Amadeus France
SODEXI
Groupe Air France Finance
FINACTA
KLM

TABLE OF CONTENTS

	Page
Counter-Statement of the Question Presented for Review	i
Parties to the Proceedings and Rule 29.6 Statement	ii
Table of Contents	iii
Table of Authorities	v
Summary of Reasons to Deny the Petition	1
Statement of the Case	3
A. Nature of the Case	4
B. Proceedings Below	4
Reasons for Denying the Petition	5
I. There is No Inter- or Intra-Circuit Split on the Question Presented	5
A. Any Split of Authority Between the Fifth and Seventh Circuits is Irrelevant to the Question Presented	6
B. Any Split of Authority Between the Fifth Circuit and the First, Second, Third, Ninth, or Eleventh Circuits is Irrelevant to the Question Presented	9
1. First Circuit	9
2. Ninth and Second Circuits	10
3. Third and Eleventh Circuits	11
4. Texas Appeals Court	12
5. Second Circuit	13
C. The Lower Courts Do Not Improperly Rely on Montreal Protocol No. 4's Change in Article 24	15

TABLE OF CONTENTS – Continued

Page

D. The Lower Courts Properly Read and Applied *Tseng* 15

II. The Decision Below Comports with the View of the Court of Last Resort of a Sister Signatory Referenced by Petitioners 16

Conclusion 17

Prayer 18

TABLE OF AUTHORITIES

Page

CASES:

Abramson v. Japan Airlines Co., Ltd., 739 F.2d 130 (3d Cir. 1984) 11, 12

Air France v. Saks, 470 U.S. 392 (1985) 6

Chan v. Korean Air Lines, 490 U.S. 122 (1989) 6

Eastern Air Lines v. Floyd, 499 U.S. 530 (1991) 6

El Al Israel Airlines, Ltd. v. Tseng, 525 U.S. 155 (1999) ..... *passim*

Floyd v. Eastern Air Lines, 872 F.2d 1462 (11th Cir. 1989), *rev'd on other grounds*, 499 U.S. 530 (1991) 11, 12

Hernandez v. Air France, 545 F.2d 279 (1st Cir. 1976), *cert. denied*, 430 U.S. 950 (1977) 9, 10

Hill v. United Airlines, 550 F.Supp. 1048 (D.Kan. 1982) 12

Imtiaz v. Emery Air Freight, Inc., 728 S.W.2d 897 (Tex.App. – Houston [1st Dist.] 1987, no writ) 12, 13

King v. American Airlines, Inc., 284 F.3d 352 (2d Cir. 2002) 13, 14

Olympic Airways v. Husain, 540 U.S. 644 (2004) 6

Read-Rite Corp. v. Burlington Air Express, 186 F.3d 1190 (9th Cir. 1999) 10

Victoria Sales Corp. v. Emery Air Freight, Inc., 917 F.2d 705 (2d Cir. 1990) 10

Wolgel v. Mexicana Airlines, 821 F.2d 442 (7th Cir. 1987), *cert. denied*, 484 U.S. 927 (1987) 6, 7, 9

Zicherman v. Korean Air Lines Co., 516 U.S. 217 (1996) 6

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

28 U.S.C. § 1603 ..... ii, 3

49 U.S.C. § 40105 5

OTHER AUTHORITIES:

Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, October 12, 1929, 49 Stat. 3000 T.S. No. 876, 137 L.N.T.S. 11 (1934), *note following* 49 U.S.C. § 40105 (1997) 5

Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air; Cong. Rec. S11059-02 (Sep. 28, 1998) 6, 15

Sidhu v. British Airways plc, [1997] A.C. 430 .....16, 17

SUMMARY OF REASONS TO DENY THE PETITION

Petitioners have repeatedly opposed Respondent's settlement offers, removal of action to federal court and prayer for protection under the Warsaw Convention in the hopes of showing that an airline industry insider[1] was defrauded as to a standard term in a uniform contract of international air carriage requiring passengers to pay all applicable tariff and tax charges upon each instance of checking in baggage.

First, Petitioners attempt to show a split of authority among Circuit Courts, most notably the Seventh Circuit's ruling in *Wolgel* that non-performance of a contract of carriage is not subject to the Convention. In this case, however, Petitioners bring a complaint of substandard performance and a dispute over uniform contract of carriage terms. For this Honorable Court to even entertain review of this case would open the door to subjecting international air carriers to innumerable interpretations of uniform contract provisions. Granting review could also undo this Honorable Court's jurisprudence surrounding the Convention in future cases by the mere allegation of a misrepresentation at the baggage counter. Moreover, Petitioners suggest that their entitlement to state law recovery arises from the alleged absence of a remedy under the Convention. In fact, Petitioners could have, but chose not to, pursue delay damages. Petitioners also refer to decisions of other Circuits in hopes of showing a conflict with the Fifth Circuit's decision in this case. The cases from other Circuits, however, involve claims arising either

[1] *See* Petitioners' Appendix A pg. 2, and B pg. 12.

away from the airport or otherwise outside the normal and proper course of air transport. Other cases cited by Petitioners have been abrogated by this Honorable Court. Petitioners also attempt, "in cart precedes horse fashion," to persuade this Honorable Court to find a split of authority generated by a Texas appeals court decision. That is, Petitioners ask this Honorable Court to consider that Texas law might prohibit an international treaty from precluding recovery under Texas law. Consequently, no split of authority exists as to the question presented to this Honorable Court.

Second, Petitioners criticize the Fifth Circuit's reference to Montreal Protocol No. 4. They fail to explain however, how their criticism requires review by this Honorable Court even if it were accurate.

Third, Petitioners criticize the Fifth Circuit's interpretation of this Honorable Court's decision in *Tseng*. Petitioners would read *Tseng* to mean that the absence of a Warsaw Convention remedy is their ticket to state law recovery, because the substantive scope of the Convention means the collection of causes of action and remedies provided therein. Petitioners could have chosen, but decided otherwise, to pursue recovery of their damages under the delay damages remedy provided by the Convention. Petitioners overlook this Honorable Court's description of the substantive scope of the Convention as being "only and exclusively, the airline's liability for passenger injuries occurring 'on board the aircraft or in the course of any of the operations of embarking or disembarking.'"[2] Because it is undisputed that Petitioners' complaint arose

[2] *Tseng*, 525 U.S. at 171-72.

during the ordinary temporal and physical course of those activities, *Tseng* was properly understood and applied by the lower courts in this case.

Finally, Petitioners refer to the *Sidhu* decision by the British House of Lords in hopes of showing inconsistency between American Courts and those in the United Kingdom in the interpretation of the Warsaw Convention. Petitioners rely only on dicta from the *Sidhu* decision. In *Sidhu*, the British House of Lords held that the Convention precluded claims not specifically addressed by the Convention due to the intent of uniformity. That result and its reasoning is virtually identical to the *Tseng* decision and the decisions of the lower courts in this case.

STATEMENT OF THE CASE

Société Air France ("Air France") makes the following corrections and additions to Petitioners' preamble summary. Petitioners were not charged $4,048.66 to transport excess baggage from Texas to Nigeria. Rather, that charge was for the transport of excess baggage from France to Nigeria, and an offered settlement for figures in that amount and above has been repeatedly opposed by Petitioners. Petitioners also opposed the removal of this suit to federal court, although it was against a foreign state under 28 U.S.C. § 1603 and premised on a contract of international air carriage. Finally, Petitioners opposed the application of the Warsaw Convention to their state law claims for mental anguish, exemplary damages and other extra-contractual damages. The Honorable Nancy Atlas and the Fifth Circuit Court of Appeals, however, have rejected Petitioners' opposition.

A. Nature of the Case

Respondent agrees with Petitioners' summary of the nature of the case in part and disagrees in part. It is undisputed that Petitioners' claims are based exclusively on Texas law (e.g., statutory attorney's fees and exemplary damages) and that they seek no recovery under federal law, such as the Warsaw Convention as modified by Montreal Protocol No. 4. Consequently, the exclusive remedy provisions of the Warsaw Convention bar Petitioners' claims. Furthermore, Air France's tariffs and conditions of carriage are binding on Petitioners and bar their claims as a matter of law. Finally, the summary judgment evidence contradicts Petitioners' claims and includes no evidence to raise a material fact issue because the applicable tariffs and conditions of carriage are binding on the appellants and they are deemed to have known them.

Petitioners correctly describe George Mbaba's travel arrangements in general, but neglect to mention that his ticket was for travel on an open stand-by basis. Petitioners incorrectly state that Air France has not disputed that George Mbaba was told that his "bags would be burned." Air France specifically objected to the hearsay statement of an unidentified person, as well as other hearsay statements in Mr. Mbaba's affidavit. The lower courts have found that statement to be irrelevant.

B. Proceedings Below

Respondent agrees with Petitioners' summary of the proceedings below in part and disagrees in part. Petitioners continue to concede that this matter arose in the course of international carriage by air.

Petitioners do not seek merely the benefit of their bargain. Instead, Petitioners seek an assortment of damages under the Texas Deceptive Trade Practices Act, including attorney's fees, mental anguish, and statutory trebling of damages, as well as exemplary damages.

Petitioners correctly note the outcome in the proceedings so far. They read too broadly, however, the rulings of the lower courts. Those courts have not ruled that the Warsaw "Convention precludes passengers from bringing action of any kind under local law when they cannot establish air carrier liability under the Convention."[3] Instead, those courts have ruled that the Convention's preclusive effect applies to claims arising in the course of international air carriage. Claims arising outside of that course (e.g., an auto accident in the airport parking lot, a slip and fall in the airport elevator or food court) may not be precluded by the Convention.

REASONS FOR DENYING THE PETITION

I. There Is No Inter- or Intra-Circuit Split on the Question Presented

Petitioners correctly note that this Honorable Court has granted review several times since 1985 for cases involving application of the Warsaw Convention[4] involving

[3] Emphasis omitted. *See* Petitioners' Petition for Writ of Certiorari, pg. 4.

[4] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876, *note following* 49 U.S.C. § 40105.

death and other similarly important matters.[5] Respondent finds no instance, however, in which this Honorable Court has ever dignified a request for review of a case in which an airline industry insider claimed to have been misled by an alleged statement of an unidentified baggage agent in direct contradiction of the uniform conditions of carriage and thereby demanded recovery for mental anguish, exemplary damages, attorney's fees and state law trebling of damages pursuant to a state law consumer protection statute. Far from helping to resolve a divergence of reasoning among the Circuit Courts, any ruling in this case would add confusion without clarification.

A. Any Split of Authority Between the Fifth and Seventh Circuits is Irrelevant to the Question Presented

Petitioners present the *Wolgel* decision of the Seventh Circuit[6] in hopes of showing a conflict with the decision of the Fifth Circuit in this case. The *Wolgel* decision predated Montreal Protocol No. 4.[7] In *Wolgel*, passengers were bumped from their flight. The Seventh Circuit Court of

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[5] *Olympic Airways v. Husain*, 540 U.S. 644 (2004) (death); *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999) (concealed molestation); *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217 (1996) (double fatality); *Eastern Air Lines v. Floyd*, 499 U.S. 530 (1991) (mental anguish sans physical injury from near death experience); *Chan v. Korean Air Lines*, 490 U.S. 122 (1989) (269 passengers en route to Korea killed by Soviet military); and *Air France v. Saks*, 470 U.S. 392 (1985) (permanent deafness from improper pressurization).

[6] *Wolgel v. Mexicana Airlines*, 821 F.2d 442, 444 (7th Cir. 1987), *cert. denied*, 484 U.S. 927 (1987).

[7] Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air. *See* Cong. Rec. S11059-02 (Sep. 28, 1998).

Appeals held that bumping in that case amounted to non-performance of the contract of carriage. That Court further reasoned that non-performance claims fall outside of the Warsaw Convention, because inclusion of recovery for non-performance of a contract in the Convention was considered during the drafting of Article 21 of the Convention, but ultimately decided against and left out of the Convention. *Id.* at 444.

Petitioners' search for support in *Wolgel* fails for several reasons. Petitioners' claim does not involve *non-performance* of a contract. Instead, their claim is that Air France's contract performance fell short of what Mr. Mbaba believed was promised, because Paris tariff and tax charges were applied to his excess baggage when he checked them in at the Paris airport.[8] In bumping cases, a passenger's departure is confirmed in writing as an express term in the air carriage contract. An air carrier's failure to comply with that term can be considered non-performance. In this case, however, the uniform contract of carriage expressly states that carriage of baggage is subject to various terms including application of tariffs, taxes and related amounts upon check-in of baggage. Petitioners complain because Air France applied these charges when Mr. Mbaba checked in his excess baggage at the Charles De Gaulle Airport in Paris, France. To be sure, Petitioners' claim amounts to a dispute over the terms of the contract, *not* non-performance. For this Honorable

[8] Petitioners suggest that they have no remedy under the Convention. The Convention, however, provides for delay damages under Article 19. Petitioners might have pursued recovery under Article 19 as their damages were purportedly necessary to avoid further delay by Air France's alleged substandard performance. Petitioners decided against pursuing such recovery in favor of purely state law remedies.

Court to even entertain allowing a cause of action outside the Convention over the terms of a contract of carriage would open the door to subjecting international air carriers to as many interpretations of their uniform contracts of carriage, and attendant remedies, as there are destinations in their travel offerings. Moreover, different juries in a given destination might also add even more different interpretations and remedies.

In order to accept Petitioners' argument that Air France either did not perform or even incompletely performed the contract of carriage, this Honorable Court would have to accept absurd assumptions and thereby undermine its jurisprudence surrounding the Warsaw Convention. In order for this case to be considered a case of non-performance, or even substandard performance,[9] this Honorable Court must either (1) ignore the uniform terms of the contract of carriage, or (2) accept the premise that the express terms of a contract of carriage, and indeed the application of taxes and tariffs across the globe, can be revoked by an alleged oral statement made by a baggage agent, even though the terms of the uniform contract of carriage also prohibit such revocation. Air France's uniform contract of carriage specifically states that passengers are responsible for additional tariff and tax charges that are applicable whenever baggage is checked in. Because those terms are in evidence and not controverted, review by this Honorable Court would be an exercise in futility.

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[9] Substandard performance would be irrelevant to the *Wolgel* decision, absent an expansion of the reasoning therein.

B. Any Split of Authority Between the Fifth Circuit and the First, Second, Third, Ninth or Eleventh Circuits is Irrelevant to the Question Presented.

Anticipating the failure of the *Wolgel* decision to show a split of authority related to their claim, Petitioners resort to summary references to carefully tailored quotes from decisions of other Circuits. Those decisions do not help Petitioners because they are unrelated to this case and demonstrate no meaningful split of authority among Circuit Courts.

1. First Circuit.

Petitioners suggest that *Hernandez v. Air France*[10] allows relevant "remedies of local law." In that case, terrorists removed their luggage from a conveyor belt in the baggage claim area of the terminal, produced submachine guns and opened fire upon persons in the baggage claim area.[11] That court reached its decision against applying the Convention after noting that passengers and non-passengers alike are exposed to the type of harm that was involved in that case, so that it would be improper to allow passengers a strict liability cause of action under the Convention while non-passengers have no such right for injuries in the baggage claim area.[12] In our case, Mr. Mbaba admits that his alleged damages occurred at the baggage counters in the course of his checking in excess

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[10] 545 F.2d 279, 284 (1st Cir. 1976), *cert. denied*, 430 U.S. 950 (1977).

[11] *Id.* at 281.

[12] *Id.* at 284.

baggage. Unlike in *Hernandez*, only international air carriage customers like Petitioners are allowed to check in excess baggage and purchase carriage of same. For those reasons, *Hernandez* does not conflict with the Fifth Circuit's decision.

2. Ninth and Second Circuits.

Petitioners also cite the *Read-Rite*[13] and *Victoria Sales*[14] decisions in hopes of showing a conflict with the Fifth Circuit. Both of those decisions involve cargo losses occasioned away from the airport. By contrast, Petitioners complain of episodes at the counters, of baggage agents in Texas and later Paris shortly before departure. In *Read-Rite*, the Ninth Circuit upheld summary judgment denying a plaintiff's claim for a crate broken before transport from England to San Francisco.[15] At a facility "near, not within the perimeter of, Heathrow Airport . . . a ground handling agent accidentally damaged one of the crates and the machinery within."[16] The District Court held that the Convention did not apply "because Article 18(3) of the Convention states that it 'shall not extend to any transportation by land, by sea or by river performed outside an airport.'"[17] The Circuit Court "agree[d] with the district court that, by the plain terms of Article 18, the Warsaw Convention does not apply," because "the goods in this case

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[13] *Read-Rite Corp. v. Burlington Air Express, Ltd.*, 186 F.3d 1190 (9th Cir. 1999).

[14] *Victoria Sales Corp. v. Emery Air Freight, Inc.*, 917 F.2d 705, 707 (2d Cir. 1990).

[15] *Read-Rite*, *supra* at 1193.

[16] *Id.*

[17] *Id.* at 1194.

were destroyed during ground transportation that was close to – but clearly outside – London's Heathrow Airport."[18] In *Victoria Sales*, the Second Circuit held that the scope of the Warsaw Convention did not include damage due to cargo that was lost at the carrier's warehouse one-quarter mile outside the airport.[19] Because those decisions involved claims arising outside the temporal and physical scope of the Convention, they have no application to this case, so that those decisions do not conflict with the Fifth Circuit's decision.

3. Third and Eleventh Circuits.

Petitioners cite the *Abramson*[20] and *Floyd*[21] decisions in hopes of showing a conflict with the Fifth Circuit. This is not the first time that *Abramson* has been presented to this Honorable Court in an effort to criticize the Fifth Circuit's interpretation of the Convention. This Honorable Court has, however, abrogated *Abramson* in favor of the accurate respect for the intent of uniformity in the Convention found in the Fifth Circuit's reading of the Convention.[22] Petitioners apparently admit that *Tseng* makes *Abramson* inapplicable except that its reasoning might be applied to non-injury cases. *Abramson*, however, was an injury case, specifically involving aggravation of a hernia. Moreover, this Honorable Court's ruling in *Tseng* was

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[18] *Id.*

[19] *Victoria Sales*, *supra* at 707-08.

[20] *Abramson v. Japan Airlines Co., Ltd.*, 739 F.2d 130, 134 (3d Cir. 1984).

[21] *Floyd v. Eastern Airlines*, 872 F.2d 1462, 1481 (11th Cir. 1989), *rev'd on other grounds*, 499 U.S. 530 (1991).

[22] *El Al Israel Airlines v. Tseng*, 525 U.S. 155, 161 n.3 (1999).

driven by the interest of uniformity. While jurisdictions may differ somewhat on claims and remedies available for injuries, they differ vastly on the interpretations, claims and remedies available for contract disputes and consumer fraud (or *caveat emptor*) theories of liability. To suggest that *Tseng*'s abrogation of *Abramson* still allows for local remedies in disputes over the terms of uniform contracts of international air carriage is analogous to declaring the absence of an elephant in a room where no one has ever confronted the pachyderm, and likely for good reason. The elephantine interest of uniformity in the regulation of international air carriage does not need to be repeated by this Honorable Court to disgruntled passengers alleging misrepresentations at the baggage counter. This Honorable Court similarly explained that its ruling in *Tseng* encompassed the *Floyd* decision.[23] For those reasons, those decisions do not present an unresolved conflict with the Fifth Circuit's decision in this case.

4. Texas Appeals Court.

Petitioners cite *Imtiaz v. Emery Airfreight*[24] to suggest that a Texas appeals court decision presents a split of authority within the Fifth Circuit, although it is not a decisions from a State court of last resort, since no appeal to the Texas Supreme Court was pursued. *Imtiaz* was a cargo case in which the Texas appeals court relied on the 1982 published decision of a U.S. District Court in Kansas.[25] The *Imtiaz* decision pre-dated *Tseng*, which resolves

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[23] *Id.* at 162.

[24] 728 S.W.2d 897 (Tex.App. – Houston [1st Dist.] 1987, no writ).

[25] *Hill v. United Airlines*, 550 F.Supp. 1048 (D.Kan. 1982).

the issue in the case before this Honorable Court in this petition for review. Moreover, reference to a Texas (or any other State) appeals court decision begs the question of whether Texas law is available to Petitioners. Any line that may be drawn by a Texas court for purposes of determining the scope of the Convention is, for purposes of this Honorable Court, no different from the Texas Deceptive Trade Practices Act (and Texas common law of Contracts and Fraud) itself. The line that has been drawn in this case by the Fifth Circuit is not only outside the hands of Texas (and other State) courts, but is necessarily so as indicated by the reasoning in *Tseng*. To be sure, for a Texas (or other State) court to declare that the Convention does not apply so as to prevent a state law cause of action begs the question whether state law causes of action are barred by the Convention. If they are so barred, a State court's ruling is of no consequence. For those reasons, the *Imtiaz* decision provides no basis for review by this Honorable Court.

5. Second Circuit.

Petitioners cite *King v. American Airlines, Inc.*[26] to mention a distinction they perceive whereby "in the course of embarkation" is separate from "in the course of the international carriage of passengers and baggage." The court in *King*, however, noted

> the Warsaw Convention created a comprehensive liability system to serve as the exclusive mechanism for remedying injuries suffered *in the course of the "international transportation of persons,*

[26] 284 F.3d 352, 355 (2d Cir. 2002).

> *baggage, or goods performed by aircraft.*"[27] (Emphasis added).

Petitioners fail to show any difference or support for their perceived distinction. Moreover, Petitioners fail to describe how their claims fall outside of even the course of embarkation, since, like the *King* plaintiffs, Mr. Mbaba's alleged damage occurred in the process of his embarkation at the baggage counter.

In summary, granting review of this case will not resolve a divergence of authority among the Circuit Courts, but will certainly generate confusion. Rarely are Convention plaintiffs industry insiders who are traveling on an open stand-by basis, as in this case. Rarely do passengers who allege to have been misled about air travel claim that an agent orally revoked the uniform express condition that tariffs, taxes and related charges are applicable each time baggage is checked in, as in this case. Moreover, if unsatisfactory performance of a contract or misrepresentation of the terms of a contract of carriage is not subject to the Convention, then perhaps the entirety of this Honorable Court's jurisprudence on the Warsaw Convention can be undone by the mere allegation in future cases of unsatisfactory performance or misrepresentations at the check-in counter.

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[27] *Id.* at 356-57.

C. The Lower Courts Do Not Improperly Rely on Montreal Protocol No. 4's Change in Article 24

Petitioners fail to show any conflict in the Fifth Circuit's consideration of Montreal Protocol No. 4 as compared to other Circuits or a state court of last resort, or that such consideration otherwise merits review by this Honorable Court.

D. The Lower Courts Properly Read and Applied *Tseng*

Petitioners discuss passages from the *Tseng* decision in search of a conflict with the Fifth Circuit's decision in this case. As explained above, if uniformity of personal injury actions and remedies among cases of international carriage by air requires application of the Convention to those cases, then *a fortiori* uniformity in disputes over terms in uniform contracts of international air carriage requires application of the Convention in those cases because of the greater interest in uniformity in the latter. There is no dispute that Mr. Mbaba's alleged damage arose within the temporal and physical scope of the Convention, that is in the course of international transportation of persons, baggage, or goods performed by aircraft. For those reasons, the Fifth Circuit has not reached a decision in conflict with this Honorable Court.

II. The Decision Below Comports With the View of the Court of Last Resort of a Sister Signatory Referenced by Petitioners

In support of their claim of inconsistency with a sister signatory, Petitioners refer to a decision by the British House of Lords, *Sidhu v. British Airways plc*, [1997] 1 All E.R. 193.[28] Stating the ultimate opinion and decision accepted by all of the other reporting Lords, Lord Hope of Craighead explained the issue in that appeal as follows:

> So the stark issue which is before us in this appeal is whether a passenger who has sustained damage in the course of international carriage by air due to the fault of the carrier, but who has no claim against the carrier under article 17 of the Convention, is left without a remedy. *Id.* at 441.

Lord Hope later remarked, as mentioned by Petitioners, on the significance of the phrase "Unification of Certain Rules" in the title of the convention. *Id.* at 444. After summarizing decisions by this Honorable Court as well as decisions from other countries, Lord Hope concluded at the end of the opinion:

> Were remedies outside the Convention to become available, it would encourage litigation in other cases to restrict its application still further in the hope of obtaining a better remedy, against which the carrier would have no protection under the contract. I am in no doubt that the Convention was designed to eliminate these difficulties. I see no escape from the conclusion that, where the

[28] This decision also appears to be cited as [1997] 2 W.L.R. 26.

> Convention has not provided a remedy, no remedy is available. *Id.* at 454.

As with the remainder of that decision, those direct quotes make it clear that English courts agree with the reasoning of the Fifth Circuit that the absence of a Warsaw Convention remedy is no ticket to extra-Convention (or state law) recovery. Since the *Sidhu* decision is consistent with the decision on appeal before this Honorable Court, there is no basis for review of this case by this Honorable Court.

CONCLUSION

In summary, the U.S. District Judge Nancy Atlas and the Fifth Circuit Court of Appeals have correctly applied the *Tseng* decision of this Honorable Court to resolve this case. Far from necessary, review by this Honorable Court would likely undermine the jurisprudence that exists to maintain the uniformity intent of the Convention, in light of the unusual facts of this case.

PRAYER

For those reasons, Respondent prays that Petitioners' petition for a writ of certiorari be denied.

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No. 06-566

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In The

Supreme Court of the United States

EDO GEORGE MBABA AND
PATIENCE MBABA,

Petitioners,

v.

SOCIETE AIR FRANCE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
REPLY TO NEW POINTS RAISED BY AIR FRANCE ...	1
A. Mbaba Has *No* Remedy Under the Convention for Air France's Breach of Contract	1
B. There *Is* a Split of Authority Between the Fifth and Seventh Circuits on the Issue Presented....	2
C. The Convention's "Cardinal Purpose" of Uniformity Does Not Justify the Holdings of the Courts Below	4
D. Mbaba Was Not "In the Course of Embarkation" For International Travel When His Claim Arose	5
E. The Merits of Mbaba's Breach-of-Contract Claim Are Not Relevant to Whether the Convention Permits Him to Assert It.....	8
CONCLUSION.....	9
PRAYER	9

TABLE OF AUTHORITIES

Page

CASES

Buonocore v. Trans World Airlines, Inc., 900 F.2d 8 (2d Cir. 1990) 6

Day v. Trans World Airlines, Inc., 528 F.2d 31 (2d Cir. 1975) 7

El Al Israel Airlines, Ltd. v. Tseng, 525 U.S. 155 (1999) 4, 6

Evangelinos v. Trans World Airlines, Inc., 550 F.2d 152 (3d Cir. 1977) (en banc) 7

King v. American Airlines, 284 F.3d 352 (2d Cir. 2002) 6

Wolgel v. Mexicana Airlines, 821 F.2d 442 (7th Cir. 1987), *cert. denied*, 484 U.S. 987 (1987) 2, 3, 4

Other Authorities

Black's Law Dictionary, West Publishing Co., 5th ed., 1979 3

Warsaw Convention, Article 1(1) 6

Warsaw Convention, Article 17 ..... 5, 6

Warsaw Convention, Article 19 ..... 1, 9

Warsaw Convention, Article 22(1) 5

Warsaw Convention, Article 24 6

Warsaw Convention, Article 25(1) 5

Warsaw Convention, Article 28(2) 5

Warsaw Convention, Article 29(2) 5

REPLY TO NEW POINTS RAISED BY AIR FRANCE

A. Mbaba Has *No* Remedy Under the Convention for Air France's Breach of Contract

In opposing certiorari, Air France for the first time argues that Mbaba had a remedy under Article 19 of the Convention for delay damages, but that he simply "decided against pursuing" it:

> **Petitioners might have pursued recovery under Article 19 as their damages were purportedly necessary to avoid further delay by Air France's alleged substandard performance.**

Brief, p. 7 and n.8. Air France did not make this argument below, and neither the district court nor the Fifth Circuit addressed it.[1] Since Air France includes no citations to the record in its brief, it is impossible to know who Air France contends "purported" that damages were "necessary" for Mbaba to "avoid further delay." Mbaba has never made such a claim. Mbaba has never claimed to have suffered damage from any "delay."

Air France tortures logic in its attempt to cram a very large foot – Mbaba's breach-of-contract claim – into the glass slipper of Article 19. It is understandable that Air France would want to retreat from its position that the Convention leaves passengers with no remedy for any

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[1] As shown in the district court's opinion, Air France contended below that the Warsaw Convention "preempts all of Mbaba's state law claims and requires dismissal of this case in its entirety." App. 15b. If Air France had contended instead – as it now does – that Article 19 of the Convention applied, then the proper result would have been the limitation of Mbaba's recovery by Article 19, not the "dismissal of this case in its entirety."

claim except the three addressed in the Convention, but it is *this* argument that Air France urged in the courts below, it is *this* ruling that the courts below handed down, and it is *this* holding that Mbaba here challenges. Air France cannot now urge a new, Procrustean argument in opposition to certiorari simply because the decisions based on its original argument are difficult to defend.

B. There *Is* a Split of Authority Between the Fifth and Seventh Circuits on the Issue Presented

As pointed out in Mbaba's petition for certiorari, the Seventh Circuit has held that the Warsaw Convention does not preempt local law regarding claims for "nonperformance of a contract." ***Wolgel v. Mexicana Airlines***, 821 F.2d 442, 445 (7th Cir. 1987), *cert. denied*, 484 U.S. 987 (1987). By contrast, the Fifth Circuit in the case at bar held that the Convention preempted Mbaba's breach-of-contract claims. App. 9a.

Air France first denies the existence of any split in the circuits on the question presented (Brief p. 5), but then argues in the alternative that any split of authority between the Fifth and Seventh Circuits is "irrelevant." Brief, pp. 6-8. This argument depends for its validity on Air France's contention that Mbaba's claim "does not involve nonperformance of a contract." Brief, p. 7. Instead, Air France argues, Mbaba's claim is only that "Air France's contract performance fell short of what Mr. Mbaba believed was promised." *Id.* Air France classifies this as a claim only for "substandard performance," which Air France argues is distinguishable from the plaintiffs' claim in ***Wolgel***. *Id.* and n.8.

Air France cites no authority for its innovative distinction of "nonperformance" from "substandard performance." Mbaba is aware of none. Breach of contract is generally understood as:

> **Failure, without legal excuse, to perform any promise which forms the whole or part of a contract.**

See, e.g., Black's Law Dictionary, West Publishing Co., 5th ed., 1979. Here, Air France failed to perform its promise to transport Mbaba's excess bags to Lagos for $520.00. This is hornbook breach of contract. Even if Air France's demand for an additional $4,048.66 could be *semantically* distinguished as "substandard performance," there is no *legally* cognizable distinction between "substandard performance" and "nonperformance." Both are asserted as breach-of-contract claims at common law.

Air France's denial of a split of authority between the Fifth and Seventh Circuits exposes a second flaw in its logic. Since Air France contends that the Fifth Circuit was correct, then to deny a split between the Fifth and Seventh Circuits necessarily implies that the Seventh Circuit in ***Wolgel*** was also correct – that the Convention does *not* preempt local law in claims for "total nonperformance" of contract. Brief, p. 7. The flaw in this logic is that Air France's major premise – as well as that of both courts below – is that a plaintiff is precluded from recovering for any claim arising in the course of international air travel merely by virtue of the Convention's silence as to such a claim. Brief, p. 5; App. 1a; App. 23b. However, the Convention is silent as to both "nonperformance" and "substandard performance" of contract. The logic is inescapable that if one is precluded by the Convention's silence, the other must be, also.

Thus, accepting Air France's major premise compels the conclusion that ***Wolgel*** was error even if Air France's distinction of "nonperformance" from "substandard performance" is accepted as valid. If the ***Wolgel*** decision was error, then there is a split of authority between the Fifth and Seventh Circuits that this Court should now grant certiorari to resolve.

C. The Convention's "Cardinal Purpose" of Uniformity Does Not Justify the Holdings of the Courts Below

As Air France points out several times, "The cardinal purpose of the Warsaw Convention ... is to achieve uniformity of rules governing claims arising from international air transportation." ***El Al Israel Airlines, Ltd. v. Tseng***, 525 U.S. 155, 169 (1999). Air France issues a dire warning of the dangers of "subjecting international air carriers to as many interpretations of their [contracts] as there are destinations in their travel offerings." Brief, p. 8. Air France characterizes the interest of uniformity as "elephantine" (Brief, p. 12) and argues that if uniformity is required in personal injury cases,

> **... then *a fortiori* uniformity in disputes over terms in uniform contracts of international air carriage requires application of the Convention to those cases because of the greater interest in uniformity in the latter.**

Brief, p. 15. This conclusion is a *non sequitur*, and is supported neither by logic nor by the Convention itself.

First, the Convention achieves uniformity in personal injury cases by specifically addressing and uniformitizing the remedies for such injuries suffered in the course of

international air carriage in Article 17. The Convention does not address remedies for an airline's breach of contract. It does not follow that by omitting to mention them at all, the Convention achieves uniformity in contract disputes by extinction of the entire species.

Second, other provisions of the Convention fail to lend credence to the argument that uniformity is such an overarching concern as to render all other considerations unimportant. In fact, other articles specifically invoke local law in several important and substantive areas. Article 22(1) provides that damages may be awarded "in the form of periodical payments," but only if permitted by "the law of the Court seised of the case." Article 25(1) defers to "the law of the Court seised of the case" for the important determination of whether an airline's conduct is of such a character as to be deemed "wilful (sic) misconduct." Article 28(2) provides that questions of procedure are governed by local law. Article 29(2) makes the same provision with respect to calculating the period of limitations.

Airlines are, by design, already subject to local law in many significant respects. The fact that the Convention specifically leaves to local law to decide so many important matters militates against the obsessive judicial allegiance to uniformity urged by Air France as the foundation for its argument.

D. Mbaba Was Not "In the Course of Embarkation" For International Travel When His Claim Arose

Arguing that Mbaba's claims are preempted merely because he was "in the course of international air carriage," (Brief, p. 5), Air France contends there is "no dispute" that Mbaba's damages arose in "the international

transportation of persons, baggage, or goods by aircraft." Brief p. 15. Air France conflates the prefatory statement of the Convention's subject matter in Article 1(1) with the Convention's preemptive scope set forth in Article 24.[2]

There *is* a dispute as to whether Mbaba was "in the course of embarkation"[3] when his claims arose – at least as that term has been defined by the Second and Third Circuits. This Court has not adopted a test for when a passenger is "in the course of any of the operations of embarking." However, the Second Circuit considers four factors: (i) the activity of the passengers at the time; (ii) the restrictions, if any, on their movements; (iii) the imminence of actual boarding; and (iv) the physical proximity of the passengers to the gate. ***King v. American Airlines***, 284 F.3d 352, 359 (2d Cir. 2002); ***Buonocore v. Trans World Airlines, Inc.***, 900 F.2d 8, 10 (2d Cir. 1990).

Applying this test, no court has ever held that a passenger similarly situated to Mbaba – one who had not

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[2] Looking to Article 1 for the Convention's preemptive scope disregards both the express language of Article 24 and this Court's prior observations that it is Article 24 that "prescribes the exclusivity of the Convention's provisions for air carrier liability," not Article 1(1). *See, e.g.*, *Tseng*, 525 U.S. at 167.

[3] Air France accuses Mbaba of failing to show how Mbaba's claims "fall outside of the course of embarkation." Brief, p. 14. Article 17 of the Convention makes air carriers liable for "death or wounding" of the passenger if the accident that cause the bodily injury took place "on board the aircraft or in the course of any of the operations of embarking or disembarking." Air France has never contended that Article 17 applied to Mbaba's claims in the case at bar, but here seems to suggest that the Article 17 language – and by derivation, the Convention's preemptive scope – be extended to breach-of-contract claims by any person who is "on board the aircraft or in the course of any of the operations of embarking or disembarking" when the airline breaches his contract.

surrendered his ticket and was merely presenting bags for check-in in the main terminal – was "in the course of embarkation." *See, e.g.*, ***Evangelinos v. Trans World Airlines, Inc.***, 550 F.2d 152, 156 (3d Cir. 1977) (en banc) (plaintiffs were in the course of embarkation because they had completed all prerequisites to boarding except for the final security search at the gate, were congregated at the gate at the direction of airline personnel, and were awaiting the bus to take them to the plane); ***Day v. Trans World Airlines, Inc.***, 528 F.2d 31, 33-34 (2d Cir. 1975) (passengers were in the course of embarkation when they had surrendered tickets, gone through passport control, entered an area exclusively for departing passengers, and assembled at the gate in readiness for departure).

Mbaba was not on board an aircraft when the events giving rise to this suit took place – he was in a public area where his movements were unrestricted. He had not cleared security, he was not in close proximity to the gate, and boarding was not imminent. At the time Air France demanded that Mbaba pay an additional $4,048.66 if he wanted his four bags to join him on the second leg of his journey, Mbaba was indistinguishable in any legal respect from a mere passerby in the terminal who had not yet purchased a ticket. Thus, even if the Convention preempts breach-of-contract claims arising "in the course of embarkation," it would not preempt Mbaba's contract claim in the case at bar.

E. The Merits of Mbaba's Breach-of-Contract Claim Are Not Relevant to Whether the Convention Permits Him to Assert It

Citing no support in the record and including no appendix to its brief, Air France argues the merits of Mbaba's breach-of-contract claim with a canard:[4]

> **In this case, however, the uniform contract of carriage expressly states that carriage of baggage is subject to various terms including application of tariffs, taxes, and related amounts upon check-in of baggage. Petitioners complain because Air France applied those charges when Mr. Mbaba checked in his excess baggage [in Paris].**

Brief, p. 7; *see also* p. 14.

It may well be that a trier of fact in the case at bar will ultimately decide that Air France did not breach its contract with Mbaba. However, the court below did not reach the merits of Mbaba's claim, and they are not at issue here. App. 9a. The merits of a claim that has yet to be tried are not pertinent to whether this Court should decide if Mbaba has a right to assert the claim at all.

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[4] Mbaba does *not* complain about Air France's application of tariffs and taxes. There has never been any evidence that the simple application of "tariffs and taxes" accounted for Air France's $4,048.66 overcharge to Mbaba.

CONCLUSION

Mbaba has no remedy under Article 19 of the Convention. Air France's argument that there is no split between the Fifth and Seventh Circuits on the issue of the Convention's preemption of contract claims is based on a distinction between nonperformance and "substandard performance" that is not recognized in the law. Even if the Convention preempts claims arising "onboard the aircraft or in the operations of embarkation or disembarkation," Mbaba's contract claims would not be preempted.

PRAYER

For these reasons, Petitioners pray that their petition for a writ of certiorari be granted.

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